(26,107)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 640.

CHICAGO & ALTON RAILROAD COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1917.

a TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1916.

No. 2447.

THE CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Mr. William L. Patton, Mr. Silas H. Strawn, Counsel for Plaintiff in Error.

Mr. Edward C. Knotts, Mr. Monroe C. List, Counsel for Defendant in Error.

Error to the District Court of the United States for the Southern District of Illinois, Southern Division.

Transcript of record filed Dec. 11, 1916. Printed record filed Feb. 5, 1917. Edward M. Holloway, Clerk.

1 *Placita.*

Pleas in the District Court of the United States of America within and for the Southern Division of the Southern District of Illinois, held in the City of Springfield, in said Division and District, before the Honorable J. Otis Humphrey, Judge of said Court, on Monday, the 10th day of July, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States of America the one hundred and forty-first.

2 *Declaration.*

Filed June 24, 1915.

No. 15501.

THE UNITED STATES OF AMERICA

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

Debt. Damages $3,000.00. Vio. of Hours of Service Act.

Be it remembered that heretofore to wit: on the 24th day of June in the year of our Lord one thousand nine hundred and fifteen came

the United States of America, the plaintiff herein by Edward C. Knotts, Esq., United States Attorney for the Southern District of Illinois, and filed in the office of the Clerk of the District Court of the United States for the Southern District of Illinois, Southern Division, its declaration against The Chicago and Alton Railroad Company, defendant which declaration was and is in the words and figures, following, to wit:

In the District Court of the United States for the Southern District of Illinois, — Division.

2760.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Now comes the United States of America, by Edward C. Knotts, United States Attorney for the Southern District of Illinois, and brings this action on behalf of the United States against the Chicago & Alton Railroad Company, a corporation organized and doing business under the laws of the State of Illinois, and having an office and place of business at Bloomington, in the State of Illinois; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

3 For a first cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:00 o'clock A. M. on April 20, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain employee, to wit: James Ryan, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:00 o'clock A. M. on said date, to the hour of 6:00 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act

of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a second cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:00 o'clock P. M. on April 19, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain em-

4 ployee, to wit: William Smith, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:00 o'clock P. M. on said date, to the hour of 6:00 o'clock A. M. April 20, 1915.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of five hundred dollars.

For a third cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:30 o'clock A. M. on April 20, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain employee, to wit: J. W. Selders, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:30 o'clock A. M. on said date, to the hour of 6:30 P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act

of Congress defendant is liable to plaintiff in the sum of five hundred dollars.

5 For a fourth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant during the twenty-four-hour period beginning at the hour of 6:30 o'clock P. M. on April 19, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain employee, to wit: J. Fahey, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:30 o'clock P. M. on said date, to the hour of 6:30 o'clock A. M. on April 20, 1915.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a fifth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:30 o'clock A. M. on April 20, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain em-

6 ployee, to wit: James Dooley, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:30 o'clock A. M. on said date, to the hour of 6:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act

of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a sixth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Illinois.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:30 o'clock P. M. on April 19, 1915, at its office and station at Bloomington, in the State of Illinois, and within the jurisdiction of this court, required and permitted its certain employee, to wit: Chas. L. Trehm, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period to wit: from said hour of 6:30 o'clock P. M. on said date, to the hour of 6:30 o'clock A. M. on April 20, 1915.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of
7 said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of three thousand dollars and its costs herein expended.

(Signed) EDWARD C. KNOTTS,
United States Attorney.

Indorsed: Filed June 24th, 1915. R. C. Brown, Clerk.

Summons.

Filed Jan. 25, 1915.

And afterwards, to wit: on said 24th day of June A. D. 1914, a Summons was issued in said case directed to the Marshal of said District, to execute, which Summons with the Marshal's Return thereon was and is in the words, and figures following, to wit:

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
Southern District of Illinois, Southern Division, ss:

The United States of America to the Marshal of the Southern District of Illinois, Greeting:

We Command You to Summon The Chicago & Alton Railroad Company, if found in your District, to be and appear before our

Judge of our District Court of the United States for the Southern District of Illinois, on the first day of the next term thereof, to be holden at Quincy, in the Division and District aforesaid, on the 6th day of September A. D. 1915, next, to answer unto The United States of America, in an action of debt for "Violation of Hours of Service Act," to its damage, as it alleges, of Three Thousand ($3,000.00) Dollars, for the detention of said debt, and have you then and there this writ.

Witness, the Hon. J. Otis Humphrey, Judge of our said Court, at Springfield, aforesaid, this 24th day of June in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and thirty-ninth.

[L. S.] R. C. BROWN, *Clerk.*

8 *Marshal's Return.*

UNITED STATES OF AMERICA,
Southern District of Illinois,
Southern Division, ss:

I have duly executed the within writ by reading the same and delivering a true copy to W. J. Davies, Local Freight Agent of the Chicago & Alton Railroad Company, at Springfield, Sangamon County, Illinois, this 25th day of June, A. D. 1915. The president of the within named company not being found in this District.
Marshal's Fees $2.06.

V. Y. DALLMAN,
U. S. Marshal,
By S. T. METCALF, *Deputy.*

Indorsed: U. S. Marshal's No. 2481. No. 15501. District Court of the United States, Southern District of Illinois, — Division. The United States of America, vs. The Chicago & Alton Railroad Company. Summons Returnable September Term, A. D. 1915. R. C. Brown, Clerk. Filed Jan. 25th A. D. 1915. R. C. Brown, Clerk. Edward C. Knotts, Plaintiff's Attorney.

Demurrer.

Filed Aug. 10, 1915.

And afterwards, to wit: on the 10th day of August 1915, there was filed in the office of the Clerk of said Court a certain demurrer of defendant to the declaration herein, which said demurrer was and is in the words and figures, following, to wit:

In the District Court of the United States for the Southern District of Illinois, Southern Division.

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Now comes the Chicago and Alton Railroad Company, defendant, by Patton & Patton, its attorneys, and demurs to the said
9 declaration and to each and every count thereof, both generally and specially, and for cause of said special demur, the defendant says:

I.

The said declaration and each count thereof is vague, indefinite and uncertain in that it and each count thereof fails to set up and show facts from which it can be determined whether the employee in each count charged as having been on duty for a longer period than nine hours in twenty four hours was an employee subject to the terms and provisions of the Act of Congress in said declaration mentioned.

II.

The said declaration and each count thereof, when taken most strongly against the pleader states no facts showing any liability under the said Act of Congress.

III.

The said declaration and each count thereof fails to charge and set out facts showing any violation of the said Act of Congress.

IV.

The said declaration and each count thereof sets out no facts with reference to the several employees named therein sufficient to show that the said several employees or any or either of them was such an employee as was within the terms of the proviso of Section 2 of the said Act of Congress.

V.

The said declaration and each count thereof is so general in the allegations of fact with reference to the duties of the employees named therein as to give no notice to defendant of the charge upon which the supposed liability is predicated.

VI.

The declaration and each count thereof fails to charge and allege with sufficient certainty the tower, office, place or station at which the several employees in said several counts mentioned were required and permitted to be and remain on duty for a longer period than nine hours in said twenty four hour period.

VII.

The said declaration and each count thereof fails to set out facts showing that the said several employees in the several counts mentioned were operators, train dispatchers or other employees engaged primarily in the same character of service as an operator or dispatcher, who by the use of the telephone or telegraph performed the work described in said proviso.

VIII.

The said declaration and each count thereof fails to set out and allege facts from which it can be determined what the duties or employments of the said several employees were at the time when etc.

Wherefore etc.

PATTON & PATTON,
Attorneys for Defendant.

Endorsed: Filed August 10, 1915. R. C. Brown, Clerk.

And afterwards, to wit: on the 9th day of June A. D. 1916 the following further proceedings were had in said court in said case and were entered of record to wit:

And afterwards, to wit, on the 19th day of June A. D. 1916 the following further proceedings were had in said Court in said case and were entered of record to wit:

Order of June 19, 1916.

ie District Court of the United States for the Southern District of Illinois, Southern Division.

Monday, June 19th, 1916.

urt met pursuant to adjournment.
esent, the Honorable J. Otis Humphrey, Judge.

No. 15501.

THE UNITED STATES OF AMERICA
vs.
CHICAGO AND ALTON RAILROAD CO.

Vio. of Hours of Service Act.

d now on this 19th day of June A. D. 1916 comes the United s the plaintiff in this case by Edward C. Knotts, Esq., United s Attorney for the Southern District of Illinois and comes also lefendant by Messrs. Patton & Patton, its attorneys and the after hearing the arguments of counsel on the demurrer to leclaration herein and being fully advised, sustains the said rrer.

d afterwards, to wit: on the 22nd day of June 1916 the follow- urther proceedings were had in said Court in said case and were ed of record to wit:

d afterwards, to wit: on the 22nd day of June A. D. 1916 the ving further proceedings were had in said Court in said case were entered of record to wit:

Order of June 22, 1916.

e District Court of the United States for the Southern District of Illinois, Southern Division.

Thursday, June 22nd, 1916.

urt met pursuant to adjournment.
sent, the Honorable J. Otis Humphrey, Judge.

No. 15501.

THE UNITED STATES OF AMERICA
vs.
THE CHICAGO AND ALTON RAILROAD CO.

Debt. Damages $3,000.00. Vio. Hours of Service Act.

d now on this 22nd day of June A. D. 1916 comes Edward notts, Esq., United States Attorney for the Southern District

of Illinois and on his motion leave is granted the said United States to file amendments to its declaration herein. It is further ordered by the Court that the defendant plead within two days from this date.

Amendments to Declaration.

Filed June 22, 1916.

And afterwards, to wit: on said 22nd day of June 1916 there was filed in the office of the Clerk of said Court certain amendments to declaration herein which said amendments to declaration was and is in the words and figures, following, to wit:

No. 15501.

THE UNITED STATES OF AMERICA

vs.

THE CHICAGO AND ALTON RAILROAD COMPANY.

Amendments to Declaration.

Now comes the United States of America, by Edward C. Knotts, United States Attorney, leave of court having been first obtained, and amends its declaration as follows:

In the first count, after the word "certain" in the 10th line of the second paragraph, by adding the following: "telephone operator, switch tender,"

13 In the first count, after the third paragraph, by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as above mentioned by reason of any emergency, and that no part of such service was so necessitated."

In the second count, after the word "certain" in the 10th line of the second paragraph, by adding the following: "telephone operator, switch tender and,"

In the second count, after the third paragraph, by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as above mentioned by reason of any emergency, and that no part of such service was so necessitated."

In the third count, after the word "certain" in the 10th line of the second paragraph, by adding the following: "telephone operator, switch tender and,"

In the third count, after the third paragraph by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as above mentioned by reason of any emergency, and that no part of such service was so necessitated."

In the fourth count, after the word "certain" in the 10th line

of the second paragraph, by adding the following: "telephone operator, switch tender and,"

In the fourth count, after the third paragraph, by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as above mentioned by reason of any emergency, and that no part of such service was so necessitated."

In the fifth count, after the word "certain" in the 10th line of the second paragraph, by adding the following: "telephone operator, switch tender and,"

In the fifth count, after the third paragraph, by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as above mentioned by reason of any emergency, and that no part of such service was so necessitated."

In the sixth count, after the word "certain" in the 10th line of the second paragraph, by adding the following: "telephone operator, switch tender and,"

In the sixth count, after the third paragraph, by adding the following paragraph: "Plaintiff further alleges that said employee was not required and permitted to be and remain on duty as
14 above mentioned by reason of any emergency, and that no part of such service was so necessitated."

(Signed) EDWARD C. KNOTTS,
United States Attorney.

Endorsed: Filed June 22, 1916. R. C. Brown, Clerk.

Demurrer to Amendments to Declaration.

Filed June 23, 1916.

And afterwards, to wit: on the 23rd day of June 1916 there was filed in the office of the Clerk of said Court a certain demurrer to amendments to declaration which said demurrer was and is in the words and figures, following, to wit:

In the District Court of the United States for the Southern District of Illinois, Southern Division.

Term No. —. Gen. No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Now comes the Chicago and Alton Railroad Company, defendant, by Patton & Patton, its attorneys, and demurs to the said declaration as amended and to each and every count thereof, both generally and specially, and for cause of said special demur, the defendant says:

I.

The said declaration and each count thereof is vague, indefinite and uncertain in that it and each count thereof fails to set up and show facts from which it can be determined whether the employee in each count charged as having been on duty for a longer period than nine hours in twenty four hours was an employee subject to the terms and provisions of the Act of Congress in said declaration mentioned.

15 II.

The said declaration and each count thereof, when taken most strongly against the pleader states no facts showing any liability under the said Act of Congress.

III.

The said declaration and each count thereof fails to charge and set out facts showing any violation of the said Act of Congress.

IV.

The said declaration and each count thereof sets out no facts with reference to the several employees named therein sufficient to show that the said several employees or any or either of them was such an employee as was within the terms of the proviso of Section 2 of the said Act of Congress.

V.

The said declaration and each count thereof is so general in the allegations of fact with reference to the duties of the employees named therein as to give no notice to defendant of the charge upon which the supposed liability is predicated.

VI.

The declaration and each count thereof fails to charge and allege with sufficient certainty the tower, office, place or station at which the several employees in said several counts mentioned were required and permitted to be and remain on duty for a longer period than nine hours in said twenty four period.

VII.

The said declaration and each count thereof fails to set out facts showing that the said several employees in the several counts mentioned were operators, train dispatchers or other employees engaged in the same character of service as an operator or dispatcher,

who by the use of the telephone or telegraph performed the work described in said proviso.

16 VIII.

The said declaration and each count thereof fails to set out and allege facts from which it can be determined what the duties or employments of the said several employees were at the time when etc.

IX.

The said declaration and each count thereof alleges that the named person alleged to have been employed in violation of the act was "its certain telephone operator, switch tender and employee" which allegation is so uncertain, indefinite and unspecific as to the character of the employment of the person named as to be insufficient pleading in an action to recover a penalty under the statute.

Wherefore etc.

PATTON & PATTON,
Attorneys for Defendant.

Endorsed: Filed June 23, 1916. R. C. Brown, Clerk.

And afterwards, to wit: on the 26th day of June 1916 the following further proceedings were had in said Court in said case and were entered of record to wit:

And afterwards, to wit: on the 26th day of June A. D. 1916, the following further proceedings were had in said Court in said case and were entered of record to wit:

17 *Order of June 26, 1916.*

In the District Court of the United States for the Southern District of Illinois, Southern Division.

Monday, June 26th, 1916.

Court met pursuant to adjournment.
Present, the Honorable J. Otis Humphrey, Judge.

No. 15501.

THE UNITED STATES OF AMERICA
vs.
THE CHICAGO AND ALTON RAILROAD CO.

Debt. Damages $3,000.00. Vio. Hours of Service Act.

And on this 26th day of June A. D. 1916 comes the United States the plaintiff in this case by Edward C. Knotts, Esq., United States

Attorney for the Southern District of Illinois and comes also the defendant The Chicago and Alton Railroad Co., by Messrs. Patton & Patton its attorneys, and the Court having heard the arguments of said attorneys on the demurrer of defendant to the amendments to plaintiff's declaration, and being fully advised in the premises, it is ordered by the Court that said demurrer be and the same is hereby overruled, to which ruling of the Court, defendant then and there excepts.

And afterwards, to wit: on the 28th day of June 1916 there was filed in the office of the Clerk of said Court a certain plea of defendant which said plea was and is in the words and figures, following to wit:

18 *Plea.*

Filed June 28, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

And the defendant by Patton & Patton, its attorneys, comes and defends the wrong and injury, when, etc., and says that it does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against it, and of this the defendant puts itself upon the country, etc.

PATTON & PATTON,
Attorneys for the Defendant.

Endorsed: Filed June 28, 1916. R. C. Brown, Clerk.

And afterwards, to wit: on the 28th day of June 1916 there was filed in the office of the Clerk of said Court a certain Stipulation which said Stipulation was and is in the words and figures, following, to wit:

19 *Stipulation of Facts.*

Filed June 28, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Stipulation.

Now come the plaintiff and the defendant in the above numbered and styled cause, by their respective attorneys, and in order to facilitate the trial of the same, enter into the following agreement:

1. A jury is hereby expressly waived.

2. This cause may be heard and determined by the Court upon the following facts, which are agreed to be true in all particulars:

I.

Defendant is a corporation organized and doing business under the laws of the State of Illinois and having an office and place of business at Bloomington, in said State. It is, and was during all the times mentioned in plaintiff's declaration, a common carrier engaged in interstate commerce by railroad in said State.

II.

During the year 1915 defendant maintained in the City of Bloomington, Illinois, three certain switch shanties, all located upon its main line of railroad, known and designated as follows:

"Jacksonville Switch" shanty, located about 500 feet north of defendant's passenger station.

"Locust Avenue" shanty, located about 1100 feet north of said station.

"Seminary Avenue" shanty, located about one mile north of said station.

20 III.

All of the above shanties are located within what is known as the "yard limits" of Bloomington, which extends from a point about ¾ of a mile south of said passenger station to a point about seven miles north thereof; and all trains operated over this portion of defendant's

line, which is double tracked, are under the control of the Yard Master and are governed by the following rule:

"All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear."

IV.

During the month of April 1915, defendant had in its employ at said shanties the following men, designated by it as "switch tenders," and who were so employed on the days charged in said declaration:

"Jacksonville Switch" shanty: James Ryan, who worked from 6:00 A. M. to 6:00 P. M. and William Smith, who worked from 6 P. M. to 6:00 A. M.

"Locust Avenue" shanty: J. W. Selders, who worked from 6:30 A. M. to 6:30 P.M. and J. Fahey, who worked from 6:30 P. M. to 6:30 A. M.

"Seminary Avenue" shanty: James Dooley, who worked from 6:30 A. M. to 6:30 P. M. and Chas. L. Trehm, who worked from 6:30 P. M. to 6:30 A. M.

V.

All of the work regularly and generally required of said employees, as well as that required on the days mentioned in said declaration, was in connection with the use of certain switches and telephones, which said work pertained to and affected the movements of trains of defendant engaged in interstate commerce. Each of said shanties was equipped with a telephone, all three being on the same circuit, and connected with the Yard Master's office. Their work was as follows:

At the "Jacksonville Switch" shanty the employee on duty handles 8 switches, one of which is the junction switch for the movement of trains to and from the Jacksonville line and the main line, and also to the storage track where locomotives are held while waiting for passenger trains moving from Bloomington to the north.

21 At the "Locust Avenue" shanty the employee handles 12 switches governing the movement of north-bound trains into the yard, south bound trains pulling out of the yard, and also switches through which all locomotives pass to and from the roundhouse; he also handles two sets of cross-over switches through which the various yard movements are made and over which locomotives are moved to and from the roundhouse.

At the "Seminary Avenue" shanty the employee handles 8 switches for the movement of south-bound trains into the yard, and also switches for the movement of northbound trains out of the yard. In addition thereto he handles a cross-over switch through which engines from northward inbound trains cross over to move to the roundhouse, and also any other necessary yard movements through these cross-overs.

The work of these employees is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains

moving through the yard. The telephones are used to permit the Yard Master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed. He also uses the telephone to instruct said employees what tracks to line up for trains coming into or moving through the yard, said trains at all times moving under yard limit rules.

The telephones at "Jacksonville Switch" and "Seminary Avenue" shanties are more frequently used by the Yard Master in communicating with said employees than is the telephone at the "Locust Avenue" shanty, for the reason that the latter is but a short distance from the Yard Master's Office and communication is often made by the Yard Master to the employees at that place by signals or word of mouth. The telephones at the three places were installed principally for the purpose of making more convenient communications between the Yard Master's Office and said shanties.

VI.

The telephones at the three shanties were also used in the following manner on the days mentioned in said declaration, this be-
22 ing the manner in which they were generally used whenever it became necessary, as it frequently did, to run a north-bound train on the south-bound track, or vice versa:

On the morning of April 20th, a coal train passed down the north-bound main track and, because of yard congestion, was left standing on this track between Chestnut Street (a few blocks north of Locust Avenue) and Seminary Avenue. Immediately the Yard Master called up the employees at all three shanties and gave them the following order:

"Trains No. 6, 10 and 8 will run over the south-bound main track from Locust Avenue to Seminary Avenue."

No. 6, 10 and 8 are north-bound passenger trains. Immediately upon being given the above order, each of said employees on duty acknowledged the same by the usual reply: "All right."

The "Jacksonville Switch" shanty employee was notified so that he could communicate this information to the engineers of trains 6, 10 and 8, which were to be detoured at Locust Avenue, in order that they would have their trains under control when passing through the cross-over switch at that place. The Locust Avenue employee was notified in order that he might have his switches properly lined up to detour those trains and to hold all other trains or engines from fouling his switches at Locust Avenue until the three detoured trains had passed over on to the south-bound main track. The Seminary Avenue employee was notified in order that he might stop incoming trains far enough back to permit No. 6, 10 and 8 to cross safely at his shanty, and to guard against engines running over the track until the above trains had all passed his shanty. No. 6 left Bloomington about 2:25 A. M.; No. 10 about 4:25 A. M.; and No. 8 about 4:30 A. M.; and all were run in accordance with the Yard Master's order.

After the day employees went on duty train No. 12, a north-bound passenger train, was due; yard engine No. 88 was then switching on the north-bound main track below Chestnut Street, and at about 9:30 A. M., the Yard Master gave said employees the following order over the telephone:

"No. 12 will run from Locust Avenue to Seminary Avenue over the south-bound main track."

This order received the usual acknowledgment from the three employees. At 10:49 A. M., said train No. 12 left Bloomington and ran to Locust Avenue where it was crossed-over and then proceeded to Seminary Avenue against the current of traffic. The
23 "Jacksonville Switch" shanty employee notified the engineer of No. 12; the "Locust Avenue" shanty employee lined up his switches for the cross-over movement; and the "Seminary Avenue" shanty employee held opposing movements until No. 12 cleared his shanty; all of which work is more fully described in the first part of this paragraph.

VII.

All instructions or orders received from the Yard Master, as above set forth, were always transmitted by said employees to the engine or train crews either verbally or by hand signal, and in no case were said employees required to write out said instructions or orders for transmission to these crews.

VIII.

None of the service required of any of said employees on the days mentioned in said declaration was necessitated by reason of any emergency. They were the regular assigned hours of said employees, fixed in that manner by defendant's operating department which acted under instructions received from its legal department, to the effect that said employees, while performing service as herein described, were not such employees whose hours of service, under the provisions of the Federal Hours of Service Act, were limited to nine hours in a twenty four hour period.

EDWARD C. KNOTTS,
United States Attorney;
MONROE C. LIST,
Special Assistant United States Attorney,
Attorneys for Plaintiff.
PATTON & PATTON,
SILAS H. STRAWN,
Attorneys for Defendant.

Indorsed: Stipulation. Filed June 28, 1916. R. C. Brown, Clerk.

24 *Defendant's Motion for Special Finding of Facts.*

Filed July 10, 1916.

And afterwards, to wit: on the 10th day of July 1916 there was filed in the office of the Clerk of said Court a certain Motion by de-

fendant for Special Finding of Facts, which said Motion together with the special Finding of Facts by the Court was and is in the words and figures, following, to wit:

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Comes now the defendant by its attorneys at the close of all the evidence and moves and requests the court that the Court make a special finding upon the facts, and submits herewith a special finding thereon, and asks that the same be made, found and adopted by the Court as its Special finding of facts.

PATTON & PATTON,
Attorneys for the Defendant.

Special Finding of Facts.

Filed July 10, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Now come the parties by their attorneys, and thereupon a jury is waived by written stipulation, and thereupon there was filed
25 in this cause a written stipulation of counsel as to the facts, and thereupon this cause was submitted to the Court for trial without a jury upon said written stipulation of facts, and the Court having considered and read and heard the said facts as set forth in the said stipulation and the argument of counsel, and being now fully advised, doth make and find the following special findings of fact, that is to say:

I.

Defendant is a corporation organized and doing business under the laws of the State of Illinois and having an office and place of business at Bloomington, in said State. It is, and was during all the times

mentioned in plaintiff's declaration, a common carrier engaged in interstate commerce by railroad in said State.

II.

During the year 1915 defendant maintained in the City of Bloomington, Illinois, three certain switch shanties, all located upon its main line of railroad, known and designated as follows:

"Jacksonville Switch" shanty, located about 500 feet north of defendant's passenger station.

"Locust Avenue" shanty, located about 1100 feet north of said station.

"Seminary Avenue" shanty, located about one mile north of said station.

III.

All of the above shanties are located within what is known as the "yard limits" of Bloomington, which extends from a point about ¾ of a mile south of said passenger station to a point about seven miles north thereof; and all trains operated over this portion of defendant's line, which is double tracked, are under the control of the Yard Master and are governed by the following rule:

"All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear."

IV.

During the month of April 1915, defendant had in its employ at said shanties the following men, designated by it as "switch
26 tenders," and who were so employed on the days charged in said declaration:

"Jacksonville Switch" shanty: James Ryan, who worked from 6:00 A. M. to 6:00 P. M. and William Smith, who worked from 6 P. M. to 6:00 A. M.

"Locust Avenue" shanty: J. W. Selders, who worked from 6:30 A. M. to 6:30 P. M. and J. Fahey, who worked from 6:30 P. M. to 6:30 A. M.

"Seminary Avenue" shanty: James Dooley, who worked from 6:30 A. M. to 6:30 P. M. and Chas. L. Trehm, who worked from 6:30 P. M. to 6:30 A. M.

V.

All of the work regularly and generally required of said employees, as well as that required on the days mentioned in said declaration, was in connection with the use of certain switches and telephones, which said work pertained to and affected the movements of trains of defendant engaged in interstate commerce. Each of said shanties was equipped with a telephone, all three being on the same circuit, and connected with the Yard Master's office. Their work was as follows:

At the "Jacksonville Switch" shanty the employee on duty handles 8 switches, one of which is the junction switch for the movement of trains to and from the Jacksonville line and the main line, and also to the storage track where locomotives are held while waiting for passenger trains moving from Bloomington to the north.

At the "Locust Avenue" shanty the employee handles 12 switches governing the movement of north-bound trains into the yard, south bound trains pulling out of the yard, and also switches through which all locomotives pass to and from the roundhouse; he also handles two sets of cross-over switches through which the various yard movements are made and over which locomotives are moved to and from the roundhouse.

At the "Seminary Avenue" shanty the employee handles 8 switches for the movement of south-bound trains into the yard, and also switches for the movement of north-bound trains out of the yard. In addition thereto he handles a cross-over switch through which engines from northward inbound trains cross over to move to the roundhouse, and also any other necessary yard movements through these cross-overs.

27 The work of these employees is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard. The telephones are used to permit the Yard Master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed. He also uses the telephone to instruct said employees what tracks to line up for trains coming into or moving through the yard, said trains at all times moving under yard limit rules.

The telephones at "Jacksonville Switch" and "Seminary Avenue" shanties are more frequently used by the Yard Master in communicating with said employees than is the telephone at the "Locust Avenue" shanty, for the reason that the latter is but a short distance from the Yard Master's Office and communication is often made by the Yard Master to the employees at that place by signals or word of mouth. The telephones at the three places were installed principally for the purpose of making more convenient communications between the Yard Master's Office and said shanties.

VI.

The telephones at the three shanties were also used in the following manner on the days mentioned in said declaration, this being the manner in which they were generally used whenever it became necessary, as it frequently did, to run a north-bound train on the south-bound track, or vice versa:

On the morning of April 20th, a coal train passed down the north-bound main track and, because of yard congestion, was left standing on this track between Chestnut Street (a few blocks north of Locust Avenue) and Seminary Avenue. Immediately the Yard Master

called up the employees at all three shanties and gave them the following order:

"Trains No-. 6, 10 and 8 will run over the south-bound main track from Locust Avenue to Seminary Avenue."

No-. 6, 10 and 8 are north-bound passenger trains. Immediately upon being given the above order, each of said employees on duty acknowledged the same by the usual reply: "All right."

The "Jacksonville Switch" shanty employee was notified so that he could communicate this information to the engineers of trains 6, 10 and 8, which were to be detoured at Locust Avenue, in order that they would have
28 their trains under control when passing through the cross-over switch at that place. The Locust Avenue employee was notified in order that he might have his switches properly lined up to detour those trains and to hold all other trains or engines from fouling his switches at Locust Avenue until the three detoured trains had passed over on to the south-bound main track. The Seminary Avenue employee was notified in order that he might stop incoming trains far enough back to permit No-. 6, 10 and 8 to cross safely at his shanty, and to guard against engines running over the track until the above trains had all passed his shanty. No. 6 left Bloomington about 2:25 A. M.; No. 10 about 4:25 A. M.; and No. 8 about 4:30 A. M.; and all were run in accordance with the Yard Master's order.

After the day employees went on duty train No. 12, a north-bound passenger train, was due; yard engine No. 88 was then switching on the north-bound main track below Chestnut Street, and at bout 9:30 A. M., the Yard Master gave said employees the following order over the telephone:

"No. 12 will run from Locust Avenue to Seminary Avenue over the south-bound main track."

This order received the usual acknowledgment from the three employees. At 10:49 A. M., said train No. 12 left Bloomington and ran to Locust Avenue where it was crossed-over and then proceeded to Seminary Avenue against the current of traffic. The "Jacksonville Switch" shanty employee notified the engineer of No. 12; the "Locust Avenue" shanty employee lined up his switches for the cross-over movement; and the "Seminary Avenue" shanty employee held opposing movements until No. 12 cleared his shanty; all of which work is more fully described in the first part of this paragraph.

VII.

All instructions or orders received from the Yard Master, as above set forth, were always transmitted by said employees to the engine or train crews either verbally or by hand signals, and in no case were said employees required to write out said instructions or orders for transmission to these crews.

VIII.

None of the service required of any of said employees on the days mentioned in said declaration was necessitated by reason of any emergency. They were the regular assigned hours of said
29 employees, fixed in that manner by defendant's operating department which acted under instructions received from its legal department, to the effect that said employees, while performing service as herein described, were not such employees whose hours of service, under the provisions of the Federal Hours of Service Act, were limited to nine hours in a twenty four hour period.

HUMPHREY, *J.*

Indorsed, Motion for Special Finding of Fact. Filed July 10, 1916. R. C. Brown, Clerk.

Plaintiff's Motion for Judgment.

Filed June 28, 1916.

And afterwards, to wit: on the 28th day of June, 1916, there was filed in the office of the Clerk of said Court plaintiff's motion for judgment which said motion was and is in the words and figures, following to wit:

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Plaintiff's Motion for Judgment.

This cause having been submitted upon an agreed statement of facts, the Plaintiff moves the Court to enter judgment in its favor on the 1st, 2nd, 3rd, 4th, 5th and 6th causes of action of its declaration filed herein, this motion to apply separately to each of said causes of action.

EDWARD C. KNOTTS,
United States Attorney;
MONROE C. LIST,
Special Assistant United States Atty.;
Attorneys for Plaintiff.

Endorsed: Filed June 28, 1916. R. C. Brown, Clerk.

30 *Defendant's Motion for Judgment.*

Filed July 10, 1916.

And afterwards, to wit: on the 10th day of July, 1916, there was filed in the office of the Clerk of said Court a certain motion of defendant for judgment, which said motion was and is in the words and figures, following, to wit:

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Defendant.

And now comes the defendant at the close of all the evidence and after the Court has made and entered its special findings, and moves the Court upon such special findings for a judgment in favor of the defendant and against the plaintiff as to each and every count of the said declaration.

PATTON & PATTON,
Attorneys for the Defendant.

Endorsed: Filed July 10, 1916. R. C. Brown, Clerk.

And afterwards, to wit: on the 10th day of July, 1916, the following further proceedings were had in said Court in said case and were entered of record to wit:

And afterwards, to wit: on the 10th day of July A. D. 1916, the following further proceedings were had in said Court in said case and were entered of record to wit:

31 *Judgment of July* 10, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

Monday, July 10th, 1916.

Court met pursuant to adjournment.
Present, the Honorable J. Otis Humphrey, Judge.

No. 15501.

UNITED STATES OF AMERICA

vs.

THE CHICAGO AND ALTON RAILROAD CO.

Debt. Damages $3,000.00. Vio. of Hours of Service Act.

And now on this 10th day of July A. D. 1916 comes the United States the plaintiff in this case by Edward C. Knotts, Esq., United States Attorney for the Southern District of Illinois and comes also the defendant The Chicago and Alton Railroad Company, by William L. Patton, Esq., its attorney and the Court having heard the motion of defendant for judgment herein, overrules the same, to which ruling of the court defendant then and there excepts, and having also heard the motion of plaintiff for judgment herein, allows the same and makes a special finding of fact upon which judgment is entered for the plaintiff against the defendant for the sum of One Hundred Dollars together with the costs of this prosecution, to which ruling of the Court defendant then and there excepts.

It is therefore considered and adjudged by the Court that the plaintiff have and recover from the said defendant, the sum of One Hundred Dollars together with its costs and charges expended in this behalf and that execution issue therefor.

And afterwards, to wit: on the 16th day of November, 1916, there was filed in the office of the Clerk of said Court a certain petition for Writ of Error, Assignment of Errors and order Allowing Writ of Error, which said petition for Writ of Error, Assignment of Errors and order allowing Writ of Error, was and is in the words and figures, following, to wit:

32 *Petition for Writ of Error.*

Filed Nov. 16, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Defendant in Error,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

To the Clerk of said Court:

Please issue writ of error in the above entitled cause, returnable to the October, 1916, Term of the United States Circuit Court of Appeals for the Seventh Circuit.

Dated this 16th day of November, 1916.

PATTON & PATTON,
Attorneys for Plaintiff in Error.

Allowance of Writ of Error.

Let the writ issue upon plaintiff in error filing bond in the sum of $500.00.

HUMPHREY, *Judge.*

Assignment of Errors.

Filed Nov. 16, 1916.

No. 15501.

THE UNITED STATES OF AMERICA, Defendant in Error,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Assignments of Error.

I.

The trial Court erred in entering judgment in favor of defendant in error and against plaintiff in error.

II.

The trial Court erred in overruling and denying the motion made by plaintiff in error for judgment upon the special findings of

33 the court in favor of plaintiff in error and against defendant in error.

III.

The trial Court erred in allowing and granting the motion by defendant in error for judgment in its favor and against the plaintiff in error, and erred in entering such judgment.

Wherefore, and for other errors apparent on the face of the record and proceedings, the plaintiff in error prays that said judgment be reversed, and for such other and further judgment as to law and justice may appertain.

PATTON & PATTON,
Attorneys for Plaintiff in Error.

Endorsed: Filed Nov. 16, 1916. R. C. Brown, Clerk.

And afterwards, to wit: on the 23rd day of November A. D. 1916 there was filed in the office of the Clerk of said Court a certain Bond on Writ of Error, which said Bond on Writ of Error and approval thereof, was and is in the words and figures, following, to wit:

Bond on Writ of Error.

Filed Nov. 23, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA, Defendant in Error,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Know All Men by These Presents: That we, Chicago & Alton Railroad Company as principal, and Chicago Bonding and Surety Company, as surety, are held and firmly bound unto the United States of America in the penal sum of Five Hundred ($500.00) Dollars, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly and securely by these presents.

Sealed with our hands and dated at Chicago, Illinois, this 22nd day of November, A. D. 1916.

34 Whereas, lately, at the setting of the United States Court for the Southern District of Illinois, Southern Division, at Springfield, Illinois, in a certain suit therein pending, wherein United States of America was plaintiff (now defendant in error) and the Chicago & Alton Railroad Company was defendant (now plaintiff in error), a judgment was rendered against the said Chi-

cago & Alton Railroad Company, and the said Chicago & Alton Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the United States of America citing and admonishing it to be and appear at the session of the Circuit Court of Appeals of the United States at Chicago within thirty (30) days from the date hereof;

Now the condition of the above obligation is such that if the said Chicago & Alton Railroad Company shall prosecute said writ of error to effect and answer *of* damages, judgments and costs, if it fail*ed* to make its plea good, then this obligation to be void, else to remain in full force and virtue.

THE CHICAGO AND ALTON RAILROAD CO., [SEAL.]

[SEAL.] By W. G. BIERD, *Its President.*

Attest:
(Signed) H. E. R. WOOD,
Its Asst. Secretary.

CHICAGO BONDING AND SURETY CO., [SEAL.]
By W. J. SABATH, *Its President.*

Attest:
OLIVER I. ROBERTS,
Its Secretary.

Approval of Bond on Writ of Error.

Approved by Hon. J. O. Humphrey, Judge of the District Court of the United States of America for the Southern District of Illinois, Southern Division.

Dated this 23 day of November A. D. 1916.

HUMPHREY, *Judge.*

Indorsed: Filed Nov. 23, 1916. R. C. Brown, Clerk.

35 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States of America, plaintiff and The Chicago and Alton Railroad Company, defendant, a manifest error hath happened, to the great damages of the said The Chicago and Alton Railroad Company, as by its complaint appears, We being willing that error, if any hath been, should be duly corrected and

full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of November in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

R. C. BROWN,
Clerk of the U. S. District Court for the Southern District of Illinois.

Allowed by
HUMPHREY, *Judge.*

36 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Southern District of Illinois,
Southern Division:

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 5th day of December A. D. 1916.

R. C. BROWN,
Clerk of the U. S. District Court for the Southern District of Illinois.

(Indorsed:) No. 15501. The United States of America vs. The Chicago and Alton Railroad Co. Writ of Error.

And afterwards, to wit: on the 23rd day of November 1916 there was filed in the office of the Clerk of said Court a certain Precipe for Transcript herein, which said Precipe for Transcript was and is in the words and figures, following, to wit:

Præcipe for Transcript of Record.

Filed Nov. 23, 1916.

In the District Court of the United States for the Southern District of Illinois, Southern Division.

No. 15501.

THE UNITED STATES OF AMERICA

vs.

THE CHICAGO AND ALTON RAILROAD CO.

Debt. Damages $3,000.00. Vio. Hours of Service Act.

Præcipe for Transcript.

To R. C. Brown, Esq., Clerk U. S. District Court, Southern District of Illinois:

You will please prepare transcript of proceedings in the above case and incorporate therein all pleadings filed and proceedings had of record including all papers pertaining to the appeal taken herein.

PATTON & PATTON,
Attorneys for Defendant.

Indorsed: Filed November 23rd, 1916. R. C. Brown, Clerk.

37 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Southern District of Illinois,
Southern Division, ss:

I, R. C. Brown, Clerk of the District Court of the United States for said Southern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true and complete Transcript of the proceedings had of record in said Court made in accordance with Præcipe filed in the case entitled The United States of America vs. The Chicago and Alton Railroad Company, as fully as the same appears from the records of said Court in said case now on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, in the District aforesaid, this 5th day of December in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] R. C. BROWN, *Clerk.*

38 *Citation.*

Filed Nov. 23, 1916.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, wherein the Chicago and Alton Railroad Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. Otis Humphrey, Judge of the District Court of the United States this 23rd day of November in the year of our Lord one thousand nine hundred and sixteen.

(Signed) HUMPHREY,
U. S. District Judge.

Service of a copy of the foregoing Citation is admitted this 23rd day of November A. D. 1916.

(Signed) EDWARD C. KNOTTS,
United States Attorney for the Southern District of Illinois.

Indorsed: Filed Nov. 23, 1916. R. C. Brown, Clerk.

39 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 38, inclusive, contain a true copy of the printed record, printed under my supervision, and filed February 5, 1917, on which this cause was argued, heard and determined in the case of The Chicago & Alton Railroad Company vs. United States of America, No. 2447, October Term, 1916, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirtieth day of July A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

40 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the third day of October, 1916, of the October term, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the one hundred and forty-first year.

And afterwards, to-wit: On the sixteenth day of December, 1916, in the October term last aforesaid, came the plaintiff in error, by its counsel, Mr. William L. Patton and Mr. Silas H. Strawn, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2447.

UNITED STATES OF AMERICA, Defendant in Error,

VS.

CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Appearance of Counsel for Plaintiff in Error.

The undersigned, William L. Patton, of Springfield, Illinois, and Silas H. Strawn of Chicago, Illinois, hereby severally enter their apperances as counsel for Plaintiff in Error in the above entitled cause.

Dated this 8th day of December, 1916.

WILLIAM L. PATTON.
SILAS H. STRAWN.

Endorsed: Filed Dec. 16, 1916. Edward M. Holloway, Clerk.

41 And afterwards, to-wit: On the tenth day of April, 1917, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 10, 1917.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Christian C. Kohlsaat, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2447.

CHICAGO & ALTON RAILROAD CO.

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 25, 1917.

42 And afterwards, to-wit: On the twenty-fifth day of April, 1917, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 25, 1917.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Christian C. Kohlsaat, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2447.

CHICAGO & ALTON RAILROAD CO.

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Southern District of Illinois, Southern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. William L. Patton, counsel for plaintiff in error, and by Mr. Philip J. Doherty, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

43 And afterwards, to-wit: On the twelfth day of July, 1917, in the October term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

44 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1916, April Session, 1917.

No. 2447.

THE CHICAGO & ALTON RAILROAD CO., Plaintiff in Error,

v.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Illinois, Southern Division.

Before Kohlsatt, Alschuler, and Evans, Cir. JJ.

Per Curiam:

The action was for violation of the Hours of Service Act of March 4, 1907. The facts were stipulated, and the question here is whether the 16 hour limit applies, or the 9 hour limit of the proviso which is applicable to "operator, train dispatcher or other employe, who by the use of the telegraph or telephone, dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements."

The employes involved are the so-called switch tenders in defendant's 7¾ mile long Bloomington-Normal yard, who conduct the

movement in and through that yard of all of defendant's trains, passenger and freight, and who were working 12 consecutive hours without emergency necessitating service beyond 9 hours. The train dispatchers and operators who direct the movement of the trains elsewhere on the road outside of the yard limit, have no function within it. Therein the yardmaster has the general direction of all train movements, his orders being communicated to and executed by his subordinates, the switch tenders, who are stationed at various switch shanties within the yard, each switch tender having special charge of certain switches in the immediate vicinity of his particular shanty, and the service being continuous, night and day. The orders for the movement of the trains are transmitted by the
45 yard master from his central office by telephone to the various switch shanties where the switch tenders, at phones therein, receive them, and execute them by transmitting them verbally or by signal to the engine or train crews, and by manipulating the switches so that trains may take their proper tracks without coming in contact with each other or with the various switch engines and cars being switched and moved thereabout. Defendant had a rule requiring trains passing through the yard to reduce speed and proceed only after the way is seen or known to be clear. This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties, each train movement so communicated to the crews or participated in by the switch tender, being preceded by his reception of a telephoned order directing it.

Our decision of August 6, 1915 in Chicago, Rock Island & Pacific Ry. Co. v. United States, reported in 226 Fed. 27, and followed by us in the Chicago & Northwestern Ry. Co. v. United States, 226 Fed. 30, is against the proposition advanced for plaintiff in error, that the 16 hour limit, and not the 9 hour limit applies; and upon the authority of those cases the judgment of the district court must be and is

Affirmed.

A true copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

46 And afterwards, on the same day, to-wit: On the twelfth day of July, 1917, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Thursday, July 12, 1917.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Christian C. Kohlsaat, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2447.

THE CHICAGO AND ALTON RAILROAD COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

47 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 7, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of the Chicago & Alton Railroad Company vs. United States of America, No. 2447, October Term, 1916, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirtieth day of July, A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

47½ [Endorsed:] United States Circuit Court of Appeals for the Seventh Circuit.

48 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Chicago & Alton Railroad Company is plaintiff in error,

and The United States of America is defendant in error, No. 2447, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
49 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

50 In the Supreme Court of the United States, October Term, 1917.

No. 2447 in U. S. Circuit Court of Appeals, Seventh Circuit.

No. 640 in U. S. Supreme Court, on Certiorari.

CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Stipulation for Use of Certified Copy of Transcript of Record on File in Supreme Court of the United States as Return to Writ.

Whereas, a writ of certiorari has been issued out of the office of the Clerk of the Supreme Court of the United States to the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, commanding that the record and proceedings in the above entitled cause shall be certified to said Supreme Court; and

Whereas, it is the desire of plaintiff in error that the certified transcript of record now on file in the Supreme Court of the United States shall be taken as a return to said writ; and

Whereas, the defendant in error is willing that such practice and proceeding be followed;

Now, therefore, it is stipulated and agreed by and between the plaintiff in error and the defendant in error, by their respective counsel, that the certified transcript of record now on file in the Supreme Court of the United States may and shall be taken as and for a complete, valid and effective return to said writ.

Dated this 31 day of October, A. D. 1917.

WILLIAM L. PATTON,
Attorney for Plaintiff in Error.
EDWARD C. KNOTTS,
Attorney for Defendant in Error.

Endorsed: Filed November 1, 1917. Edward M. Holloway, Clerk.

51 UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of The Chicago and Alton Railroad Company, Plaintiff in Error, vs. United States of America, Defendant in Error, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this second day of November, A. D. 1917.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] File No. 26107. Supreme Court of the United States, No. 640, October Term, 1917. Chicago & Alton Railroad Company vs. The United States of America. Writ of Certiorari.

52 [Endorsed:] File No. 26107. Supreme Court U. S., October Term, 1917. Term No. 640. Chicago & Alton Railroad Co., Petitioner, vs. The United States of America. Writ of Certiorari and Return. Filed November 10, 1917.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHICAGO & ALTON RAILWAY COMPANY
Petitioner,
v.
THE UNITED STATES OF AMERICA.
No. 640.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is a suit instituted by the United States in the District Court of the United States for the Southern District of Illinois, Southern Division, against the Chicago & Alton Railway Company to recover penalties provided by the so-called "hours-of-service act" of March 4, 1907 (34 Stat. 1415), on the ground that said railway company had required and permitted certain of its employees known as *telephone operators and switch tenders* to remain on

30997—17

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHICAGO & ALTON RAILWAY COMPANY
Petitioner,
v.
THE UNITED STATES OF AMERICA.
No. 640.

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30097—17

duty for a longer period than nine hours in violation of section 2 of said act which provides *inter alia:*

> That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, * * *

The case was submitted to the District Court on an agreed statement of facts and judgment in favor of the United States rendered in the sum of $100, which was affirmed by the Circuit Court of Appeals for the Seventh Circuit. Petition for certiorari to the latter judgment was granted by this court.

The question presented is whether the hours of service of these so-called *telephone operators and switch tenders* are governed by that part of the "hours-of-service act" limiting the hours of service of any employee to sixteen consecutive hours in any one day or whether they are governed by that portion of the act limiting the period of service of certain employees in all towers, offices, places, and stations continuously operated night and day to nine hours in any twenty-four-hour period.

The question is of importance to the Interstate Commerce Commission in the administration of and the detection of violations of the "hours-of-

service act" as well as to the Department of Justice in the enforcement of its provisions. Also, there is conflict of decisions among the Circuit Courts of Appeals on the question. For these reasons an early determination by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1917.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916

IN THE MATTER OF THE APPLICATION OF CHICAGO & ALTON RAILROAD COMPANY FOR A WRIT OF CERTIORARI UNDER THE ACT OF SEPTEMBER 6TH, 1916.

CHICAGO & ALTON RAILROAD COMPANY,
Petitioner,
(Defendant—Plaintiff in Error),

vs.

UNITED STATES OF AMERICA,
Respondent,
(Plaintiff—Defendant in Error).

On Petition for Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Chicago & Alton Railroad Company for a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit and ordering that the records and exhibits in a certain cause be cer-

tified to this Honorable Court for final review and determination under the provisions of the Act of September 6th, 1916, the said cause being entitled as follows in the said Circuit Court of Appeals:

> *"Chicago & Alton Railroad Company, plaintiff in error,* vs. *United States of America, defendant in error."*

Your petitioner, Chicago & Alton Railroad Company, respectfully shows and petitions this Honorable Court as follows:

First: This petition involves a conflict of decision between certain Circuit Courts of Appeals upon the question as to whether the daily period of service of certain employees of petitioner is determined at a maximum of sixteen hours by Section 2 of "An Act to promote the safety of employees and travellers on railroads by limiting the hours of service of employees thereon," approved March fourth, nineteen hundred and seven, or whether, by the first proviso of that Section such period of service is limited to nine hours.

Second: Your petitioner was sued by respondent in the United States District Court in and for the Southern District of Illinois, Southern Division, in an action of debt for three thousand dollars ($3,000) in penalties claimed to be due to the respondent by reason of certain alleged violations of said first proviso of said Section 2.

The declaration consisted of six counts, each of which, as amended, alleged that petitioner, on a certain day, required and permitted a certain *telephone operator, switch tender* and employee to remain on duty for a longer period than nine hours, and that while on duty, by the use of the telephone, he dispatched, reported, transmitted, received and delivered orders pertaining to the movement of trains in interstate commerce.

The cause was heard by the Court, without a jury, upon a stipulation of facts, and judgment was entered against petitioner for $100.00 and costs.

This judgment has been affirmed by the Circuit Court of Appeals for the Seventh Circuit.

Third: Each of the employees, as to whom the charge of excess service is made, was a *switch tender* in the yards of petitioner at Bloomington, Illinois, whose primary and principal duty was to handle and operate switches which governed the movement of trains in that yard.

Each employee occupied a shanty maintained near the switches of which he was in charge, and in each shanty was a telephone connected with the office of the Yard Master, by means of which the Yard Master directs yard movements, keeps in touch therewith, and issues

instructions to yard, train or engine crews as to the handling of yard movements only and operation of switches.

Yard movements are under the control of the Yard Master and are governed by the following rule:

> *"All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear."*

The switch tenders transmitted the Yard Master's instructions to the engine or train crews either verbally or by hand signals. In no case did the switch tender write out the instructions for transmission to the crews.

Petitioner, on the advice of its legal department, employed the switch tenders in excess of nine hours per day,—that department holding that the employees were within the sixteen hour and not the nine hour limitation of Section 2 of the Act.

Fourth: The District Court held, under a decision of the Circuit Court of Appeals for the Seventh Circuit that the employees were within the nine hour proviso and entered judgment against petitioner.

Fifth: Upon error to the Circuit Court of Appeals for the Seventh Circuit, that Court held that in that Circuit it is settled law that such employees are within

the nine hour limitation of the proviso, and affirmed the judgment.

Sixth: The Court of Appeals for the Eighth Circuit has reached a directly opposite conclusion upon an exactly like state of facts, and inasmuch as the railroad of petitioner operates in both the Seventh and Eighth Circuits, it is subject to one construction of the Act in one portion of its territory and the other construction in another.

The decision of the Circuit Court of Appeals for said Eighth Circuit is cited in petitioner's brief presented herewith.

Seventh: Petitioner shows that as a result of this conflict of decision, an important question to all interstate carriers and to the Government is involved in doubt and uncertainty, which can be settled only by this Court.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished, attached to and made a part of this application and marked "Exhibit A" in complance with Rule 37 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court

should require said case to be certified to it for its review and determination in conformity with the provisions of the Act of September 6th, 1916, said judgment being made final in said Circuit Court of Appeals by the provisions of said Act.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause entitled "*Chicago & Alton Railroad Company, plaintiff in error,* vs. *United States of America, defendant in error,* No. 2447," to the end that the said cause may be reviewed and determined by this Court as provided by the Act of September 6th, 1916, or that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of the Judicial Code and that the said judgment of the said Circuit Court of Appeals in the

said cause and every part thereof may be reversed by this Honorable Court.

CHICAGO & ALTON RAILROAD COMPANY,
By ..... Patton
..... Silas N. Strawn
Attorneys for said Petitioner.

STATE OF ILLINOIS,
COUNTY OF SANGAMON. } ss:

WILLIAM L. PATTON, being first sworn, on oath deposes and says that he he is one of the attorneys for the petitioner named in the foregoing petition by him subscribed as attorney for such petitioner; that he knows the contents of said petition and that the facts therein stated are true to the best of his information and belief.

..... William L. Patton

Subscribed and sworn to before me this 11 day of August, A. D. 1917.

..... Rosalind T. Thurman
Notary Public in and for Sangamon County, Illinois.

We hereby certify that we have examined and read the foregoing petition for writ of certiorari and that in our opinion such petition is well founded and should be granted by this Honorable Court and that such petition is not filed for delay.

..... William L. Patton
..... Silas N. Strawn
Counsel for Petitioner.

August 11, 1917.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1916.

IN THE MATTER OF THE APPLICATION OF THE CHICAGO & ALTON RAILROAD COMPANY FOR A WRIT OF CERTIORARI UNDER THE ACT OF SEPTEMBER 6TH, 1916.

CHICAGO & ALTON RAILROAD COMPANY,
Petitioner,
(Defendant—Plaintiff in Error).
vs.
UNITED STATES OF AMERICA,
Respondent.
(Plaintiff—Defendant in Error).

On Petition for Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The short statement of the matter involved in this petition, and the general reasons relied on for the allowance of the writ, sufficiently appear in the petition.

We beg to submit in support thereof, the following points for the consideration of the Court:

I.

The writ of certiorari has often been issued to avoid or cure conflict of decision between Circuit Courts of Appeals where such courts have differed on important questions.

Forsyth vs. *Hammond*, 166 U. S., 506.

Dowagiac Mfg. Co. vs. *Minnesota Plow Co.*, 235 U. S., 641.

Mast Foos & Co. vs. *Stover Mfg. Co.*, 177 U. S., 485.

II.

Section 1 of the Hours of Service Act defines its scope. Section 2 makes it unlawful for a common carrier to allow an employee to be on duty for more than sixteen consecutive hours, etc., and then follows this proviso:

> "Provided, that no operator, train dispatcher, OR OTHER EMPLOYEE who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day. * * * "

U. S. Comp. Stat., 1913, Secs. 8677-8680.

It was not contended that the switchtenders were *telegraph operators or train dispatchers,* and the facts, as above stated, are all there were which induced the trial Court, and Court of Appeals to hold that these switchtenders, by the use of the telephone, dispatched orders so as to bring them within the scope of the proviso above mentioned, under the doctrine *"ejusdem generis."*

III.

To bring the doctrine *"ejusdem generis"* into play, there must be substantial similarity in function, not merely in terms, between the persons or things sought to be included by the general words, and the specifically named persons or things.

Under the facts set forth there is no similarity in function between switchtenders in yards using the telephone to convey yard signals only, and dispatchers and operators issuing train orders to trains on the open road.

36 *Cyc.*, 1119 (II).

Clinton vs. *Wilson*, 257 Ill., 580.

Met. El. R. Co. vs. *Chicago*, 265 Ill., 624 at 629.

People vs. *Melville*, 265 Ill., 176.

IV.

A conductor, using a telephone for orders, in pursuance of a rule of the carrier, at a station having no operator, does not come within the above proviso.

U. S. vs. *F. E. C. Ry. Co.* (C. C. A., 5th Circ.), 222 Fed., 33.

U. S. vs. *C. M. & St. P.* (Dist. Ct. D., Idaho, N. D.), 219 Fed., 1011.

V.

Switchtenders in a railroad yard, who have telephones for the purpose of learning and giving information as to yard movements only are not within the proviso.

Mo. Pac. Ry. vs. *U. S.* (C. C. A., 8th Circ.), 211 Fed., 893.

VI.

The case which the Court of Appeals for the Seventh Circuit holds is conclusive upon it, is distinguishable from the instant case by the fact that in that case the

movement concerning which the order was transmitted by the switch tender was as to a *road* movement outside of yard limits, and not under yard limit rules.

C. R. I. & P. vs. *United States,* 226 Fed., 27.

VII.

We have presented these points, believing that they show not only the difference in the rule of decision adopted by the Circuit Court of Appeals for the Seventh Circuit and that adopted by the Eighth Circuit, but that the merits of the controversy are clearly with your petitioners.

Respectfully submitted,

William A. Glasgow

Charles N. Strawn

Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1916.

IN THE MATTER OF THE APPLICATION OF THE CHICAGO & ALTON RAILROAD COMPANY FOR A WRIT OF CERTIORARI UNDER THE ACT OF SEPTEMBER 6TH, 1916.

CHICAGO & ALTON RAILROAD COMPANY,
Petitioner,
(Defendant—Plaintiff in Error).
vs.
UNITED STATES OF AMERICA,
Respondent.
(Plaintiff—Defendant in Error).

On Petition for Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit.

To Mr. Edward C. Knotts, United States Attorney, Counsel for the Above Named Respondent, and to the Above Named Respondent:

Please take notice that we shall, on or before the first day of September, 1917, file in the office of the Clerk of the Supreme Court of the United States the foregoing petition for certiorari and brief, together with the printed record in the above entitled cause, and that we shall on the first motion day of the October Term, 1917, of the said Supreme Court of the United States, upon the opening of Court, or as soon thereafter as counsel can be heard at the Court room of the Supreme Court of the

United States, move that the writ of certiorari be issued as in the said petition prayed.

William Cattin
Chas. A. Strauss
Counsel for Petitioner.

Received a copy of the foregoing notice and of the petition for certiorari and brief referred to therein this 11 day of August, 1917.

Edward C. Kuale
Counsel for Respondent.

INDEX

TABLE OF CASES

No. 640.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1917.

THE CHICAGO & ALTON RAILROAD CO., *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	*On Certiorari.* Error to Circuit Court of Appeals, 7th Circuit.

STATEMENT, BRIEF AND ARGUMENT

STATEMENT

This suit was instituted in the District Court of the United States for the Southern District of Illinois,

Southern Division, by the defendant in error to recover from plaintiff in error certain penalties for alleged violations of the Hours of Service Act.

The declaration consisted of six counts, each of which, as amended, alleged that plaintiff in error, on a certain day, required and permitted a certain telephone operator, *switch tender* and employee to remain on duty for a longer period than nine hours, and

> "Plaintiff alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce."

Plaintiff in error pleaded the general issue to the amended counts, and, a stipulation as to the facts having been entered into, a jury was waived and the cause was tried by the Court.

At the close of the reading of the stipulation, plaintiff in error moved and requested the Court to make a Special Finding upon the facts, which motion was allowed and a special finding was made by the Court.

Defendant in error then moved for judgment in its favor and plaintiff in error moved for judgment in its favor.

The Court overruled the motion of plaintiff in error, and allowed the motion of defendant in error.

Judgment was entered in favor of defendant in error and against plaintiff in error for $100.00 and costs.

Plaintiff in error preserved exceptions to all adverse rulings, and sued out a writ of error from the Circuit Court of Appeals for the 7th Circuit to reverse the judgment.

The Circuit Court of Appeals affirmed the judgment, and plaintiff in error filed in this Court its petition for a writ of certiorari, which writ was allowed and issued, and the record has been duly returned into this Court for review.

THE FACTS.

The stipulation as to the facts is sufficiently brief to justify its incorporation in full as and for our statement of facts.

STIPULATION.

Now come the plaintiff and the defendant in the above numbered and styled cause, by their respective attorneys, and in order to facilitate the trial of the same, enter into the following agreement:

1. A jury is hereby expressly waived.

2. This cause may be heard and determined by the Court upon the following facts, which are agreed to be true in all particulars:

I.

Defendant is a corporation organized and doing business under the laws of the State of Illinois and having an office and place of business at Bloomington, in said State. It is, and was during all the times mentioned in plaintiff's declaration, a common carrier engaged in interstate commerce by railroad in said State.

II.

During the year 1915 defendant maintained in the City of Bloomington, Illinois, three certain switch shanties, all located upon its main line of railroad, known and designated as follows:

"Jacksonville Switch" shanty, located about 500 feet north of defendant's passenger station.

"Locust Avenue" shanty, located about 1100 feet north of said station.

"Seminary Avenue" shanty, located about one mile north of said station.

III.

All of the above shanties are located within what is known as the "yard limits" of Bloomington, which ex-

tends from a point about ¾ of a mile south of said passenger station to a point about seven miles north thereof; and all trains operated over this portion of defendant's line, which is double tracked, are under the control of the Yard Master and are governed by the following rule:

"All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear."

IV.

During the month of April, 1915, defendant had in its employ at said shanties the following men, designated by it as "switch tenders," and who were so employed on the days charged in said declaration:

"Jacksonville Switch" shanty: James Ryan, who worked from 6:00 A.M. to 6:00 P.M., and William Smith, who worked from 6:00 P.M. to 6:00 A.M.

"Locust Avenue" shanty: J. W. Selders, who worked from 6:30 A.M. to 6:30 P.M., and J. Fahey, who worked from 6:30 P.M. to 6:30 A.M.

"Seminary Avenue" shanty: James Dooley, who worked from 6:30 A.M. to 6:30 P.M., and Chas. L. Trehm, who worked from 6:30 P.M. to 6:30 A.M.

V.

All of the work regularly and generally required of said employees, as well as that required on the days men-

tioned in said declaration, was in connection with the use of certain switches and telephones, which said work pertained to and affected the movements of trains of defendant engaged in interstate commerce. Each of said shanties was equipped with a telephone, all three being on the same circuit, and connected with the Yard Master's office. Their work was as follows:

At the "Jacksonville Switch" shanty the employee on duty handles 8 switches, one of which is the junction switch for the movement of trains to and from the Jacksonville line and the main line, and also to the storage track where locomotives are held while waiting for passenger trains moving from Bloomington to the north.

At the "Locust Avenue" shanty the employee handles 12 switches governing the movement of north-bound trains into the yard, south bound trains pulling out of the yard, and also switches through which all locomotives pass to and from the roundhouse; he also handles two sets of cross-over switches through which the various yard movements are made and over which locomotives are moved to and from the roundhouse.

At the "Seminary Avenue" shanty the employee handles 8 switches for the movement of south-bound trains into the yard, and also switches for the movement of north-bound trains out of the yard. In addition thereto he handles a cross-over switch through which engines from northward inbound trains cross over to move to the

roundhouse, and also any other necessary yard movements through these cross-overs.

The work of these employees is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard. The telephones are used to permit the Yard Master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed. He also uses the telephone to instruct said employees what tracks to line up for trains coming into or moving through the yard, said trains at all times moving under yard limit rules.

The telephones at "Jacksonville Switch" and "Seminary Avenue" shanties are more frequently used by the Yard Master in communicating with said employees than is the telephone at the "Locust Avenue" shanty, for the reason that the latter is but a short distance from the Yard Master's Office and communication is often made by the Yard Master to the employees at that place by signals or word of mouth. The telephones at the three places were installed principally for the purpose of making more convenient communication between the Yard Master's Office and said shanties.

VI.

The telephones at the three shanties were also used in the following manner on the days mentioned in said declaration, this being the manner in which they were generally used whenever it became necessary, as it frequently did, to run a north-bound train on the south-bound track, or vice versa:

On the morning of April 20th, a coal train passed down the north-bound main track and, because of yard congestion, was left standing on this track between Chestnut Street (a few blocks north of Locust Avenue) and Seminary Avenue. Immediately the Yard Master called up the employees at all three shanties and gave them the following order:

"Trains No. 6, 10 and 8 will run over the south-bound main track from Locust Avenue to Seminary Avenue."

No. 6, 10 and 8 are north-bound passenger trains. Immediately upon being given the above order, each of said employees on duty acknowledged the same by the usual reply: "All right."

The "Jacksonville Switch" shanty employee was notified so that he could communicate this information to the engineers of trains 6, 10 and 8, which were to be detoured at Locust Avenue, in order that they would have their trains under control when passing through the

cross-over switch at that place. The Locust Avenue employee was notified in order that he might have his switches properly lined up to detour those trains and to hold all other trains or engines from fouling his switches at Locust Avenue until the three detoured trains had passed over on to the south-bound main track. The Seminary Avenue employee was notified in order that he might stop incoming trains far enough back to permit No. 6, 10 and 8 to cross safely at his shanty, and to guard against engines running over the track until the above trains had all passed his shanty. No. 6 left Bloomington about 2:25 A. M.; No. 10 about 4:25 A.M.; and No. 8 about 4:30 A.M.; and all were run in accordance with the Yard Master's order.

After the day employees went on duty train No. 12, a north-bound passenger train, was due; yard engine No. 88 was then switching on the north-bound main track below Chestnut Street, and at about 9:30 A. M. the Yard Master gave said employees the following order over the telephone:

"No. 12 will run from Locust Avenue to Seminary Avenue over the south-bound main track."

This order received the usual acknowledgment from the three employees. At 10:49 A. M., said train No. 12 left Bloomington and ran to Locust Avenue, where it was crossed-over and then proceeded to Seminary Avenue against the current of traffic. The "Jacksonville Switch"

shanty employee notified the engineer of No. 12; the "Locust Avenue" shanty employee lined up his switches for the cross-over movement; and the "Seminary Avenue" shanty employee held opposing movements until No. 12 cleared his shanty; all of which work is more fully described in the first part of this paragraph.

VII.

All instructions or orders received from the Yard Master, as above set forth, were always transmitted by said employees to the engine or train crews, either verbally or by hand signals, and in no case were said employees required to write out said instructions or orders for transmission to these crews.

VIII.

None of the service required of any of said employees on the days mentioned in said declaration was necessitated by reason of any emergency. They were the regular assigned hours of said employees, fixed in that manner by defendant's operating department which acted under instructions received from its legal department, to the effect that said employes, while performing service as herein described, were not such employees whose hours of service, under the provisions of the Federal Hours of Service Act, were limited to nine hours in a twenty-four hour period.

SPECIAL FINDINGS.

The Special Findings of the Court were in the language of the stipulation.

ERRORS RELIED UPON.

I.

The trial Court erred in entering judgment in favor of defendant in error and against plaintiff in error.

II.

The trial Court erred in overruling and denying the motion made by plaintiff in error for judgment upon the special findings of the Court in favor of plaintiff in error and against defendant in error.

III.

The trial Court erred in allowing and granting the motion by defendant in error for judgment in its favor and against the plaintiff in error, and erred in entering such judgment.

IV.

The Circuit Court of Appeals erred in affirming the said judgment.

V.

The Circuit Court of Appeals erred in not reversing the said judgment.

BRIEF

I.

Section one of the Hours of Service Act (Act of March 4, 1907) defines its scope. Section two makes it unlawful for a common carrier to allow an employee to be on duty for more than sixteen consecutive hours, etc., and then follows this proviso:

> "*Provided,* that no operator, train despatcher, or other employee who by the use of the telegraph or telephone despatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated night and day."
>
> U. S. Comp. Stat., 1916, Sec. 8677-8680.

II.

The construction placed upon the Act by plaintiff in error is that it designates two specific classes of employees who come within the nine hour limitation, *i. e.* (1) operators, (2) train despatchers, and concludes with the general designation "other employee," which general designation must be made specific by the test of "Lord Tenterden's Rule," which may be stated to be:

> "Where general words follow particular and specific words in a statute the general words must be

construed to include only things of the same kind as those indicated by the particular and specific words; * * * and this rule is enforced in the construction of a statute unless there is something in the statute or its context which shows that the doctrine of *ejusdem generis* should not be applied."

People vs. Melville, 265 Ill. 176, loc. cit. 178-9.

III.

"Lord Tenterden's Rule," with one of its exceptions is set out and discussed by this Court in United States vs. Mccall, 215 U. S. 26.

The only other exception to that Rule is that where the specific words signify subjects *greatly different* from one another, the Rule does not apply.

McReynolds vs. People, 230 Ill. 623 at 633.

The language of this statute comes within neither exception.

IV.

A. In construing a statute, the Court will consider contemporaneous circumstances, and the external or historical facts which led to its enactment and the evil to be remedied.

26 Am. & Eng. Ency. 632.

36 Cyc. 1110.

Kehl vs. Taylor, 275 Ill. 346 at 353.

B. A proviso is construed strictly against him who claims under it.

U. S. vs. Dickson, 15 Pet. 141.

V.

Words in common use used in a statute are to be construed in their natural, plain and ordinary signification.

36 Cyc. 1114.

VI.

Where, previous to the passage of a statute language or words used therein have received a judicial definition, it will be assumed that the Congress was aware of the definition, and used the language or words with that signification.

The Abbottsford, 98 U. S. 440 at 444.

VII.

"Operator," both in its popular signification and by judicial definition means a *telegraph* operator who receives by telegraph at his station on the open road train orders from the train despatcher to govern train movements between terminals.

In re So. Pac. Co., 155 Fed. 1001, 1004.

S. F. Pac. vs. Holmes, 202 U. S. 438.

In the last cited case the repeated use, by the Court in its opinion of the word "operator" in its signification as "telegraph operator" illustrates both the popular and judicial interpretation of the word.

VIII.

"Train despatcher" popularly and by judicial construction means an employee of a higher and different kind and grade from "operator," but working within the same general function.

In re So. Pac. Co., 155 Fed. 1001, 1004.

Va. & S. Ry. Co. vs. Clower's Admx., 102 Va. 867.

Edge vs. S. W. Mo. Elect. R. Co., 104 S. W. 90.

Strattman vs. St. L. I. M. & S., 109 S. W. 769 at 779.

B. & O. vs. Camp (C. C. A. 6th Circ.) 65 Fed. 952.

Oregon S. L. vs. Frost (C. C. A. 9th Circ.) 74 Fed. 965.

IX.

In construing a statute of ambiguous language, in order to ascertain the legislative intent, the Court will resort to legislative journals and committee reports.

C. & P. Tel. Co. vs. Manning, 186 U. S. 238 at 245.

X.

The construction of the statute contended for by plaintiff in error has been adopted by the Circuit Courts of Appeals for the 5th and 8th Circuits and by the District Court of Idaho.

Mo. Pac. vs. U. S. (Circ. Ct. App. 8th Circuit) 211 Fed. 893.

U. S. vs. F. E. C. Ry. Co. (5th Circ.) 222 Fed. 33.

U. S. vs. C. M. & St. P. (Dist. Ct. Idaho) 219 Fed. 1011.

The contrary view upon different facts is adopted by other Courts of Appeal and District Courts.

C. R. I. & P. vs. U. S. (C. C. A. 7th Circ.) 226 Fed. 30.

U. S. vs. Pa. R. Co. (Dist. Court Eastern Dist. Pa.) decided Feb. 15, 1917, 239 Fed. 576.

U. S. vs. C. C. C. & St. L. (Dist. Court for So. Dist. Ohio). Decided Dec. 12, 1911 and reported in Pamphlet of Decisions construing Federal Hours of Service Act issued June 6, 1912, p. 48.

The instant case in the Court of Appeals.

QUESTION FOR DETERMINATION.

Does the nine hour limitation in the proviso to Section 2 of the Hours of Service Act apply to switch tenders in a railroad yard, whose primary and principal duties are to throw switches and communicate information, received by telephone from a yard master, to yard, train and engine crews as to the handling of cars or trains, in view of the fact that all trains operated in the yard limits are under the control of the Yard Master and not of the Train Despatcher, and are governed by the following rule:

> "All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear."

ARGUMENT

THE INTENT OF THE ACT.

The Act is a legislative recognition of the dangers following in the train of industrial fatigue in the railroad service, and the provision of a remedy therefor by limiting the hours of labor to such periods as the legislative wisdom, taking into consideration the comparative stresses in various branches of the railroad service, conceived to be the maximum consistent with safety.

The broad class of employees to be affected consisted of "persons actually engaged in or connected with the movement of any train." (Sec. 1 of Act.)

A general limitation of 16 hours was imposed by Section 2, so that we have as the primary scheme of the Act a restriction of working hours of all employees actually engaged in or connected with the movement of trains to a maximum of 16 hours.

Infra, pp. 28, 29.

Endeavoring to arrive at the mental attitude of the Congress, we must take into consideration contemporary conditions and history, general and common knowledge as to the railroad industry, and it may be deduced therefrom that the Congress first grouped in its vision all employees so actually engaged in train movements and determined that 16 hours of labor was a safe maximum.

It then occurred to the Congress that there was a specific department of the railroad's activities in which the mental stress of primary responsibility for safety in train movements was infinitely greater than in the actual operating and running of the train over the road, viz., the train despatching department, wherein, by telephone or telegraph the despatcher sent out over the road to the operators at the various stations the orders which preserved in their due and proper relations the positions, running times and meeting points of the trains operating over the system or division.

Therefore, was the proviso added to Section 2, selecting and excepting out of the general classification of employees engaged in the movement of trains a particular department of that service.

Infra, pp. 29 et seq.

It must be assumed, we submit, that the Congress in adding the proviso, had in view what is generally, commonly and judicially recognized as the train despatching department, and that the intent of the proviso was to cover that department and no other.

A graphic picture of that department appears in the case of S. F. Pac. vs. Holmes, 202 U. S. 438 (our Brief Sec. VII, page 14), which is amplified by the other cases in Sections VII and VIII of our Brief.

From these cases and from the common knowledge of the transportation of the country which the Court may

bring to the construction of a statute, it may be said that the despatching department is the nervous system of the operation of a railroad so far as actual train movement is concerned.

The despatcher's office is the brain centre from which ramify over the system the wire nerves which convey to the various members of the train movement body the orders which enable the members to correlate without collision or conflict.

The operator gathers the information as to road conditions, transmits it to the despatcher's office and in turn receives from that office orders to be handed to the train men to govern their movements on the road.

In common acceptation, the use of the word "operator" in connection with railroad service connotes the telegraph, and "operator", in the railroad sense, means *"telegraph operator."*

With the foregoing in view, the Congress added the Proviso to Section 2, and we submit that the proper construction of that Proviso, aided by the ordinary rules of interpretation is as follows:

> *"Provided,* That no *telegraph* operator, train despatcher, or other *like* employee who by the use of the telegraph or telephone" etc.

It seems clear that the purpose of the Congress in using the words "or other employee" etc. was not to

enlarge the class by going outside of the despatching department, but the general words were employed to gather into the Proviso all members of the despatching staff even though they might not be telegraph operators or train despatchers.

When this Act was passed, (March 4th, 1907) train despatching was almost universally by telegraph, but the innovation of telephonic despatching was beginning to be tried out experimentally.

The Congress, no doubt, had this experimental innovation in mind, and after providing maximum service for the telegraph operator and train despatcher by appropriate and well understood words, having a well recognized signification, in order to provide a maximum period of service for those members of the despatching staff, who by reason of the use of the telephone or other differentiation of mode of despatching or branch of service *in the despatching department,* were strictly neither "operators" nor "train despatchers," the Congress, out of an abundance of caution, added general words which would include such employees, with no intention of thereby drawing within the nine hour maximum any employee outside the despatching staff.

It probably was feared that if the Act should read "No operator or train despatcher", *simpliciter,* the station agent or other member of the despatching staff who was receiving or transmitting train orders as to road movements *by telephone,* being neither an operator nor

a train despatcher, would not be within the remedial purposes of the Act, although subject to the same mental stresses and liability to fatigue inefficiency as the operator receiving or transmitting similar orders through the medium of the telegraph.

The evidences surrounding the Act, both external and internal, the carving out *by proviso* from the mass of employees of a particular group of employees having a definite and well understood function, the inclusion of the telephone in the description of "other employee" all are significant of the purpose of the Congress to affect by the Proviso the train despatching branch of railroad service, and that branch alone.

EFFECT OF TWO RULES OF STATUTORY CONSTRUCTION.

There are two leading rules of statutory construction which may be looked to in order to aid the ascertainment of the legislative intent.

The first of these is, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, *the proviso is construed strictly* and takes no case out of the enacting clause which does not fall fairly within its terms.

> "In short, a proviso carves special exceptions only out of the enacting clause; and those who set

up any such exception, must establish it as being *within the words as well as within the reason thereof.*"

U. S. vs. Dickson, 15 Pet. 141.

The enacting clause of the Act in question is general, fixing a maximum period of 16 hours continuous service for all employees actually engaged in or connected with the movement of any train.

By a proviso, a certain group of employees are excepted out of the mass, and for reasons which inhered in that group, present to the mind of the legislative body, are permitted to work only nine hours.

The defendant in error insists that the employees named in the declaration, *i. e.* switchmen, are within the proviso. Under the above stated rule the proviso is to be construed strictly, no member of the general class specified in the enacting clause will fall within the proviso unless it *clearly* appears that it was the intent of the legislature to except him out of it, and the burden is on defendant in error to establish that the legislature intended to exempt yard switchmen using the telephone out of the general class and put them in the class affected by the proviso.

The second rule of construction to which we appeal, is the doctrine of *ejusdem generis,* and under the rule of strict construction of provisos, Lord Tenterden's Rule must be strictly applied here.

That rule has been well stated by the Supreme Court of Illinois in the quotation found in Section II of our Brief, *supra*, p. 12.

The writer of the text of the article on Statutes in Cyc. lays down the rule,

> "The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like' and to include only others of like kind or character."
>
> 36 Cyc. 1120.

This statement of the rule is supported by a mass of authorities cited in the notes to the article.

It follows that under the rule of strict construction of provisos, the *ejusdem generis doctrine* will be applied with especial vigor in determining the true construction to be adopted.

That rule will not be relaxed in order to bring within the proviso members of the general class, *not clearly excepted* out of the enacting clause.

It will be contended by defendant in error that the proviso comes within the two exceptions to the rule noted in our Brief at Section III, page 13.

We submit that neither exception is to be applied.

The first exception is that "If the particular words exhaust the genus, the general words refer to some larger

genus." (We quote from Argument of Defendant in error in the Circuit Court of Appeals.)

The particular words are "operator, train despatcher."

As we have heretofore stated, the class of employees which the Congress sought to except out of those whose maximum period of labor was fixed at 16 hours is clearly shown by evidences external and internal to be the train despatching department, which is a department of a specific and definite function, namely, government of train movements outside of yard limits on the open road.

The use of the words "operator, train despatcher" does not "exhaust the genus."

"Operator" must be taken, under the rules of construction referred to in Sections IV to VIII of our Brief (pages 13-15) to have been used in the sense of *telegraph operator*, the man at the station on the road who transmits to the train despatcher, *by telegraph*, information as to local train arrivals, etc., and receives from the despatcher, *by telegraph*, orders for the future movements of the train between his station and the next station at which an operator is in service.

"Train despatcher" is the higher grade employee in the department, to whom information comes from all operators, and who, from that information, sends out his

orders to the train crews to keep the train movements in an orderly scheme.

It is submitted that there are many employees in the despatching department who are not included in the particular designations "operator" or "train despatcher," to which the general language is referable.

For example, the despatcher may and does send out his orders to the crews as they start from his terminal in written form by the hand of a messenger, or have them posted on a bulletin board by a clerk, and it cannot be denied that such messenger or such clerk is one of the "genus" train despatching department, though he is neither operator nor train despatcher.

The mesenger or clerk is a member of that class, not covered by "operator, train despatcher" but is an "other employee" in that department. He is not put in the nine hour class, though of that department, because the legislature puts in that class only other employees of the despatching corps "who by the use of the telegraph or telephone" etc.

The genus "train despatching department," which we submit is the *class* excepted out of the enacting clause by the Proviso, is therefore not exhausted by the specific designations.

As another example, upon a railroad on which despatching is carried on wholly or partly by telephonic

communication between the despatcher's office and points on the road, the men of his corps who transmit to him information as to local train conditions, and receive from him orders for trains by *telephone,* are neither operators nor train despatchers, though they are indubitably employees in the despatching department, subjected to the same stresses to which the operator is subjected, and therefore, by the general words of the Proviso "other employee who by the use of the telegraph *or telephone*" etc., such employee, who is in the department but not included in the specific terms used, is brought within the Proviso.

Had the Proviso mentioned merely "operator, train despatcher," without the use of the general words, the man at the distant station transmitting telephonic information and receiving telephonic orders for transmission to train crews could not have claimed to come within the class entitled to the nine hour maximum, because he is neither the one nor the other.

It is clear therefore, that there are *other employees* in the train despatching department, who report, transmit, receive or deliver orders pertaining to or affecting train movements, who are neither operators nor train despatchers. Some of them can work 16 hours, because they do not use the telegraph or telephone, and are not subjected to the stresses of that character of responsible labor, others are given the same maximum labor period

as the operator because while not strictly operators, they nevertheless, *by telephone* perform operator's functions.

As we have suggested, it was in order to avoid the legitimate contention that an employee in the despatching department, *using the telephone* to report, transmit, receive or deliver orders, could be compelled to work 16 hours because he was neither an operator nor a train despatcher, that the Congress added the general words, and not to bring within the 9 hour maximum men who performed no true despatching functions, and were not subjected to the stresses thereof, but who nevertheless, used the telephone as an auxiliary to some other function.

We submit that the first exception to Lord Tenterden's Rule does not apply, because the specific words "operator, train despatcher" did not exhaust the whole class sought to be affected by the Proviso.

The second exception, viz., that where the specific words signify subjects greatly different from one another, the Rule does not apply, does not affect the strict application of the Rule to the Proviso, because "operator" and "train despatcher" are not different in function, but are employees of the same department engaged in the carrying on of the same character of business and to a common end.

We therefore submit that the rule of *ejusdem generis* should be applied in all its strictness, and that

the Proviso, construed by the aid of that rule, should be read as if it had been written with the words which we insert in parentheses actually included, viz.:

> "*Provided,* That no (telegraph) operator, train despatcher, or other (like) employee who by the use of the telegraph or telephone despatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements" etc.

The argument which will probably be made by defendant in error, (it having been relied upon below) that "other employee" is not a general phrase, but particular, and denominates a specific class wholly different from and in addition to the class to which operators and train despatchers belong, is not tenable in the face of the external and internal evidences of the intent of the Congress, and the rules of construction in aid of ascertaining that intent.

THE LEGISLATIVE HISTORY OF THE ACT CONFIRMS THE CONSTRUCTION PLACED THEREON BY PLAINTIFF IN ERROR.

Limitation of hours of service of railway employees seems first to have claimed the attention of the Congress in 1906.

At the first session of the 59th Congress, there was introduced in the House of Representatives by Mr. E[illegible]h H. R. 18671, and and at the second session there was introduced in the Senate by Senator LaFollette S. 5133.

Both of these bills dealt with a limitation of hours of service of employees engaged in or connected with the movement of a train, and neither sought to affect the despatching or signalling department.

(See Minority Report of Com. on Interstate and Foreign Commerce, House Reports, Vol. 2, Miscellaneous, 59th Congress 2d Session, H. R. 7641).

The original Esch bill seems to have languished, but the LaFollette bill was urgently pressed, and passed the Senate in practically its original form on January 10, 1907.

Upon reference to the House Committee on Interstate and Foreign Commerce, a majority report of that Committee offered a substitute by its report No. 7641 of February 16, 1907, which substitute contains the first reference to the limitation of hours of service of the despatching staff in the form of a proviso, which is in the precise language of the proviso which subsequently became a law, except that the word "consecutive" wherever it appears in the Committee bill was stricken before its passage.

The Majority and Minority Reports throw some light on what was meant and intended by the Committee in inserting the proviso.

On page 5 of the Majority Report (H. R. 7641) we find:

"The employees intended to be affected by this bill are all persons actually engaged in or connected with the movement of any train. *The class of railway employees particularly affected are conductors, brakemen, engineers, firemen, train despatchers, and telegraph operators,* as all of these classes have to do with train movements."

* * * * * * * *

"A new proviso has been added to section 2, having particular reference to operators and train despatchers. *The exacting and responsible character of their work, and recent terrible railroad disasters attributable directly or indirectly to the negligence or overwork or both of this class of employees induced the Committee to restrict their hours of service.*"

It will be observed that the Proviso in the Committee bill enumerates "operator, train despatcher, or other employee who by the use of the telegraph or telephone" etc. which is the language of the bill which became a law.

The paragraph from the Majority Report last above quoted groups *operator and train despatcher* together and denominates them as "this class," thus clearly showing that the Majority of the Committee intended the proviso to except out of the general 16 hour class a 9 hour class composed of the despatching staff.

The Minority Report (page 10 of H. R. Rep. 7641) emphasizes this classification as follows:

"The only improvement on the Senate Act it" (the Committee bill) "contains, is the provision to limit the hours of work of *telegraphers, operators, and train despatchers.*"

* * * * * * *

"We append hereto H. R. 18671 and S. 5133. We would be glad to support either if permitted to offer it as a substitute for the pending proposition, if at the same time we could be permitted to amend either of them so as to make it include a satisfactory and effective provision to limit the hours of *telegraphers, operators, and train despatchers* on duty."

Both Majority and Minority Reports thus show an intention to except out of the 16 hour class the despatching corps, and put that class under a 9 hour limitation.

The Senate disagreed with the House on the Committee bill, and the report of a conference committee was submitted to the Senate on March 1, 1907. (Cong. Rec. 59th Congress, 2d Session, p. 4348.)

The conferees were unable to agree on the Committee bill, but presented to both Senate and House an amended bill in which the Proviso was amended to put the despatching staff in an 8 hour class, and created a 12 hour class, putting therein *exactly the kind of employees who are involved in the instant case.*

The Proviso in the conference bill was as follows:

"*Provided,* That no train despatcher or despatcher's operator in the dispatcher's office or other

employee who by the use of the telegraph or telephone issues orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than eight hours in any twenty-four hour period; and that no employee who by the use of the telegraph or telephone transmits, receives, or delivers orders pertaining to or affecting train movements (excepting those who *issue* train orders), or who is charged with the operation of signals, or switchers from towers, offices, or stations shall be required or permitted to be or remain on duty for a longer period than twelve hours."

Mr. Hepburn, from the Committee on conference, submitted the conference report to the House on March 1st. (H. R. Rep. No. 8155).

It is clear from the Statement of the Managers on the Part of the House that it was considered that the Proviso of the Committee (Esch) Bill affected only the despatching staff, and that the Conference amendment of the Proviso was for the purpose of shortening the hours of towermen, interlocking switchmen and signalmen to a period not so short as that of the despatching staff, but not so long as that of train men, thus carrying out the idea of making the limitation commensurate with the mind and nerve stress of the several classes.

A distinction is made between those who *issue* and those who *transmit*, etc.

It was recognized that the language of the ~~Conference~~ Committee (Esch) bill "No operator, train despatcher or other employee who by the use of the telegraph or telephone"

etc., under general rules of statutory construction would bring within the Proviso only the despatching class, and that to enlarge the benefits of the Proviso it would be necessary to enlarge the specific language by adding other specifically named employees who were not *ejusdem generis* "operator" and "train despatcher."

The discussion of the Conference bill in the Senate (Cong. Rec. 59th Congress, 2d Session pp. 4435-38, 4539-40, 4542-45, 4546-48, 4549, 4635-37) clearly shows that the purpose of the Senate was to enact a law limiting the hours of service of *trainmen* to 16 hours, and of the *despatching staff* to 9 hours and that no other class of employees was included in the final Act.

It is also clear that no confusion existed in the mind of the Senate as to what and who were to be included in the train despatching class, and that when the Senate passed the final Act, "other employee," was intended to mean "other like employee," *i.e.* other employee engaged in the movement of trains on the open road by telegraphic or telephonic orders, emanating from the despatcher, and despatched, reported, transmitted, received or delivered by other members of the despatching department or class.

So, in the discussion in the House (Cong. Rec. 4620-4625) it is apparent that two classes were under consideration, trainmen and the despatching department.

There can be no doubt that both branches of the Congress knew that the language of the Proviso as it finally became a part of the law, confined the 9 hour limitation to operators, train despatchers and other employees of the like function, and that it was the intention that it should so confine the limitation.

If it had been intended to include within the 9 hour limitation switchtenders in yards who received instructions from the yard master by telephone the Congress was aware of the character of language requisite to include them.

The Act was not hastily, unadvisedly or inconsiderately passed. It became a law after repeated, intelligent and sometimes acrimonious discussion.

The Congress had the benefit of the advice of the great organizations representing the train men and the railway telegraphers, and of the Interstate Commerce Commission.

Under these circumstances, it is impossible to believe that if it was intended to include in the Proviso employees who were not within the despatching class, the Congress would not have included them specifically, as was suggested by the Conference Committee in their bill, which was rejected by both branches of the Congress.

THE FACTS CONCERNING THE DUTIES OF THE SWITCHTENDERS DO NOT BRING THEM WITHIN THE PROVISO AS PROPERLY CONSTRUED.

We submit that the Proviso, properly construed should be given effect as if it read as set forth on page 19, *supra*.

The remaining question, then, is whether, under the facts, the switchtenders in their use of the telephone are within the class sought to be restricted to a nine hour maximum of labor. In other words, construing the Proviso strictly, is such a switchtender an "operator, train despatcher or other (like) employee who by the use of the telegraph or telephone" etc.?

In order to resolve this question, it is necessary, first, to consider the train despatching department and its functions in contrast with the duties of the switchtenders, as shown by the facts.

We have, to some extent, discussed the duties of the train despatching department.

While there is no specific enumeration or description of those duties in the stipulation, nevertheless the Court will look to the judicial definitions thereof to which we have referred in our Brief, (Sections VII and VIII pp. 14, 15) and will apply also its own knowledge thereof so far as the rules of law will permit under the ordinary rules of evidence.

As has been humorously stated by a venerated Judge of the Supreme Court of Illinois, "Courts will not pretend to be more ignorant than the rest of mankind."

Munn vs. Birch, 25 Ill. 35.

Fisher vs. Jansen, 30 Ill. App. 91.

Among the things of which a Court will not pretend ignorance is

> "The manner in which ordinary railroad business is conducted, and of the every day practical operation of them."
>
> C. C. C. & St. L. Ry. Co. vs. Jenkins, 174 Ill. 398 loc. cit. 402.

There is no department of the service more generally familiar to the well informed layman, by newspaper and magazine description, as well (if we may indulge the liberty) as by contemporary romance, as that of the despatching of trains.

All are familiar with the picture of the despatcher at his desk, the centre of a network of wires, his train sheet before him, receiving news from the various agencies of his department as to the location of the trains, meeting each variation of time by re-arrangement of schedule and meeting points, and keeping the traffic moving over the road despite accident and storm.

It is well known, not only in the railroad world, but generally, that the most nerve racking of all responsible

positions is that of the despatcher, who sits at his key sending out over his division those intricate and complex orders to the trains on the road, which maintain the service as an orderly whole, and prevent mishap. He must so concentrate that he can visualize, at every moment, the exact position on the open road of every train, regular, special or extra, so that the meeting points may be ordered with the nicety of a well regulated machine. He must re-arrange his schedule to meet every contingency of accident or delay, and decide instantly the most momentous questions involving safety of life and limb.

The orders he sends out are as to operations on the open road, where the movements are restrained, checked and expedited by his judgment and skill alone.

When the train enters a terminal or an intermediate station having a yard, his responsibility and command cease, and the movements of the train in the yard are no longer under his running orders, but are controlled and guided by the Yard Rules, under the administration of the Yard master. Yard movements cannot be governed at long range by the despatcher, but must depend upon a general rule under which enginemen keep their trains under control.

Responsibility for safety of life and equipment after the train enters yard limits is no longer on the despatching corps, but the primary responsibility is transferred to the engine crew under the Yard Rules, *which take the*

place of and wholly supersede the train despatcher's orders, which are practicable only outside of yard limits.

Every engineman and conductor on the division, while on the open road and not in the carrying on of yard movements, looks to the despatcher's office and to it alone, to keep the complicated system running smoothly, to meet emergencies and supply the remedy for the inevitable, unforseen thing which may, in the tick of a watch, require the re-arrangement of the entire schedule to avoid disaster.

But when yard limits are entered the train is outside the purview of the despatcher, and the engineman trusts for safety to observance of yard rules and visible and audible signals.

Signals, either visible or audible, observation and vigilance of the engine men, and the principle of keeping all trains "under control" are the only means by which yard operations can be carried on.

On the open road, train movements are by despatcher's train orders; in the yard they are by general order and signal.

Not only does the Court judicially know that this is the system, but it so appears from the finding of facts in the instant case.

Section III of the Finding of Facts, (Record page 25), is as follows:

"All of the above shanties are located within what is known as the 'yard limits' of Bloomington, which extends from a point about ¾ of a mile south of said passenger station to a point about seven miles north thereof; and all trains operated over this portion of defendant's line, which is double tracked, *are under the control of the Yard Master and are governed by the following rules*:

"'*All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear.*'"

We thus have a section of the tracks 7¾ miles long in which there is no train despatching, but the operations are under a different department and different system, and dependent for safety upon the observance of the rule and of signals.

Again, we find in Section V of the Finding of Facts (Record p. 27), the following:

"The work of these employees" (*i. e.* the switch-tenders,) "is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard. The telephones are used to permit the Yard Master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed. He also uses the telephone to instruct said employees what tracks to line up for trains coming into or moving through the yard, said trains at all times moving under yard limit rules.

"The telephones at 'Jacksonville Switch' and 'Seminary Avenue' shanties are more frequently used by the Yard Master in communicating with said employees than is the telephone at the 'Locust Avenue' shanty, for the reason that the latter is but a short distance from the Yard Master's Office and *communication is often made by the Yard Master to the employees at that place by signals or word of mouth.* The telephones at the three places were installed principally for the purpose of making more convenient communications between the Yard Master's Office and said shanties."

Again in Section VII of the Finding of Facts, (Record p. 28), is the following:

"All instructions or orders received from Yard Master, as above set forth, were always transmitted by said employees to the engine or train crews either verbally or by hand signal, and in no case were said employees required to write out said instructions or orders for transmission to these crews."

The switchtender gives no order to any one, nor does he communicate an order, or receive an order in the sense of the Proviso. All the switch tender does is to indicate to the engineer what track he may proceed on. He does not order or command the engineer to proceed. If the engineer does proceed, the train order under which he does so is the general rule above quoted. The real operative force is the general yard rule and that is the only order, properly speaking, affecting or pertaining to train movements in this district. It is just as if the trains were streams of water constantly flowing. The switch

tenders under the direction of the Yard Master divert them into different channels, but no orders are given to the engineers any more than orders, in the example, would be given to the streams of water. The movement is automatic under the general yard rule and the only train order is the general yard rule quoted above. The purpose of Congress in passing said Act, *i. e.*, safety of employees and travel, is provided for by this general yard rule, requiring all trains to run carefully, expecting to find a train or cars ahead on the same track they are using, and prepared to stop within range of vision.

It is clear from the foregoing that none of the functions of the despatching department devolve upon the switchtender, and none of the reasons which actuated the Congress in putting the despatching corps upon a nine hour basis are present with reference to the switchtenders.

The nervous and mental stresses resulting from responsibility for train movements on the open road, miles from the vision of him from whom orders for the safety of those movements must come, and at places where fast time must be made and where no vigilance upon the part of the train crews can suffice without definite instructions from the despatcher's office, are the causes of the industrial fatigue from which the Proviso was intended to protect the employee and traveler.

These stresses and their causes are wholly absent in the direction and control of movements within yard limits, governed by the Yard Rule, and effected, under that rule by signals, audible or visible.

At close range, the Yard Master conveyed his signals by hand or by word of mouth; at longer distances the telephone was used. In this instance the telephone was no more than a megaphone, permitting word of mouth signals, not despatcher's orders, to be conveniently transmitted from one point in the yards to another; and it must be remembered, to engines and crews which were all the while operating under the paramount yard rule.

The inefficiency produced by fatigue, would be no greater factor in such use of the telephone than it would be in the use of a megaphone by day or a signal lantern by night, or in the operation of a set of yard signal boards controlled by the pull and push of rods through pulleys, moved by levers, as in the interlocker plant.

The operative of a vast system of interlocking switches, where switches are thrown and signals displayed and changed at long distances from the lever tower, can work under this Act of Congress for sixteen hours at a stretch.

The Congress did not consider that fatigue inefficiency would impair the usefulness of such a man within a sixteen-hour period.

A twelve hour period for these men was proposed by the Conference Committee but rejected by both branches of the Congress. (*Supra*, pp. 32-33.)

Can it be that the Congress contemplated that the mere substitution of the telephone signal for the visible signals of the interlocking plant would so increase fatigue that the switch tender who telephoned should come within the nine hour classification, while the switch tender who transmits signals by levers and rods can be kept on duty for sixteen hours?

It would seem from the mere statement of the query that a negative answer must follow.

We submit that the reasoning of Judge Carland in the Missouri Pacific case, plainly shows that the switch tender's functions are not such as to bring him within the Proviso.

The learned Judge says, in writing of the functions of yard switchmen when confined solely to yard movements:

> "Their primary duty was to throw these switches whenever necessary, and the telephones were used to inform them from time to time what was wanted in regard to the switching and in reporting to those who intended to use the switches, the preparation that had been made for such use. It did not differ except in complexity of operation from the service performed by a brakeman who runs ahead of his trains, turns a switch, and swings his hand by day, or lantern by night to signal the engineer. If one is within the Proviso of Section 2, so is the other, unless it be held that the mere use of the telephone brings one switchman within the nine

hour provision and leaves another who does not use it under the sixteen hour clause, although the service performed is the same. But we apprehend that there will be no contention that Congress fixed the period of nine hours for certain employees because of the use of the telephone. The difference in the hours of labor fixed by Section 2 was based upon the character of the service rendered by the employee, not upon the use of the telephone."

If the Congress had intended yard switchmen using the telephone, for precisely the same purpose which the interlocker operative subserves by pulling and pushing his levers, *i. e.*, the control of yard movements, to be in the nine hour class, it is inconceivable that Congress should have omitted tower interlocker operators from the Proviso.

The fatigue from responsibility and nerve strain is infinitely greater in the case of the tower man, but he was not included because the Proviso is clearly intended to be a protection to employees and the public from the errors and mistakes of train despatchers, governing road movements, caused by the fatigue of long hours at the telegraph key or telephone, devoted to the intricate business of governing the movements of trains on the open road.

If the contention of the Government should be upheld, we should have the anomalous situation that the switchtenders at "Jacksonville Switch" and "Seminary

Avenue'' shanties were within the Proviso, solely because the communications from the Yard Master were by telephone, while the switchtender, at "Locust Avenue" shanty would be within the 16 hour class, because he received exactly similar communications by word of mouth.

The work of all three men is the same, the responsibilities the same, nerve and mind stress and liability to fatigue the same, but two of the men would be limited to a nine hour maximum because, forsooth, they use the telephone, while the third can be held on duty sixteen hours.

It cannot be that the Congress could have intended any such absurd consequence, and the only construction of the Proviso which will relieve it of such absurdity is to follow the manifest intent of the Congress and hold that the Proviso affects the train despatching staff, and no other department of the service.

A construction of a statute which would lead to absurd consequences is always avoided.

Uphoff vs. Indust. Board, 271 Ill. 312 at 316.

It was not the mere use of the telegraph or telephone which determined the class covered by the Proviso; it was the character of the act to be performed over the wire, and the resultant fatigue from the long continued performance of these duties.

A despatcher would be no less such, and no less subjected to nerve exhaustion, whether he conveyed his train orders by heliograph or semaphore, or by the military "wig-wag";—the medium of communication is not the criterion,—the criterion is the thing to be communicated.

A switchtender and signalman in yard operations, where all engines are run under control, upon signals and not by train orders, becomes no more than a switchtender or signalman merely because some of his signaling is done over the telephone wire, rather than by moving a semaphore arm by pulling a lever.

It can hardly be urged with any sincerity, that the Congress intended, in the classification in the Proviso, to make the phrase "or other employee" so inclusive that irrespective of the character of the communication, every employee who uses the telephone to communicate to another employee information as to train movements becomes, *ipso facto,* a despatcher or operator, or an employee performing despatching functions.

Must a station baggageman be put in the nine hour class because he is required to telephone to a yard switchman when the train leaves the depot, in order that the switchman may line up the yard for the outgoing train? Or because he is telephoned to by a switchman from the outer end of the yards when a train is approaching, so

that he may inform a switch crew working near the depot to clear.

Manifold instances of constant practice in yard operations where every kind and grade of employee must needs use the telephone to communicate concerning yard movements will occur to the Court upon reflection, of such a character as to convince, we think, that the Congress, in adding the Proviso intended to affect the despatching staff and that only, and that the switchtenders in this case do not come within either the letter or the reason of the exception.

If the Government's contention be sustained, then every employee of a railroad from the President down to the messenger boy who may incidentally to his primary duties deliver orders over the telephone which affect the movement of trains, no matter how remotely they may affect them, is subject to the provisions of this Proviso. It is submitted that this was clearly not the intention of Congress but that its intention is as interpreted in the Missouri Pacific case, *supra*, i.e., that only employees in the despatching department performing duties of the same general character as operators and despatchers should come within the Proviso.

CASES CONSTRUING THE PROVISO.

We think that the cases cited in Section X of our Brief (page 15) are all of the Federal adjudications directly construing the Proviso.

These cases of course, are of value in this Court only for the reasoning contained in the opinions, and not as authority.

The *Missouri Pacific case,* (211 Fed. 893) is the only one in which the facts with reference to the duties of the switchtenders and the grade, place of employment and responsibilities of like employees were in any wise similar to those in the instant case.

We submit that the analysis and reasoning of Judge Carland in that case, and his application of the doctrine of *ejusdem generis* is perfectly in accord with established principles of statutory construction, harmonizes the Proviso with the enacting clause and avoids a construction which, as we have shown, would lead to the absurdity of putting employees, performing exactly the same functions, in the nine hour or sixteen hour class, respectively because they do or do not, incidentally to their duties, use the telephone.

As is well said by Judge Carland, it cannot be that the use of the telephone is the criterion, and not the fundamental theory and purpose of the Act, *i. e.,* to relieve from liability to fatigue inefficiency, such relief to be admeasured by the comparative stresses under which those engaged in two separate departments of the train movement service labor.

The construction adopted by Judge Carland, and for which we contend, gives a reasonable, workable and definite line of cleavage between the 16 hour and 9 hour classes, based upon the fundamental idea of the Act, namely prevention of fatigue inefficiency by limiting the hours of labor, and proportioning the limitation in accordance with the nerve and mind stresses respectively borne on the one hand by the despatching staff, and on the other by all other employees having to do with train movements, whether the telephone is or is not used as an incident to their duties.

IN CONCLUSION.

We submit, with deference, that by any proper construction of the Proviso within the intent of the Congress in enacting the same, the provisions thereof apply solely to the despatching department; that the Finding of Facts shows that the employees, claimed by the Government to have been within the nine hour class created by the Proviso, were not so, and that the judgments of the District Court and of the Circuit Court of Appeals should be reversed.

All of which is respectfully submitted.

WILLIAM L. PATTON,
Attorney for Plaintiff in Error.

SILAS H. STRAWN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHICAGO & ALTON RAILROAD COMPANY, Petitioner, v. THE UNITED STATES OF AMERICA. } No. 640.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case, tried upon an agreed statement of facts, resulted below in a judgment for $100 as a penalty for violations, by a railroad company, of the hours-of-service act of March 4, 1907 (ch. 2939, 34 Stat. 1415, 1416).

The act makes it unlawful for any railroad subject to its provisions to permit an employee "actually engaged in or connected with the movement of any train" to remain on duty "for a longer period than sixteen consecutive hours," with this proviso:

> That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, trans-

mits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period or not exceeding three days in any week.

THE FACTS.

The employees now in question were worked twelve consecutive hours per day at a place continuously operated day and night. They were not telegraph operators or train dispatchers. The question is, were they *other employees who by the use of the telegraph or telephone dispatched, reported, transmitted, received, or delivered orders pertaining to or affecting train movements*?

They were known as switch tenders, and were on duty at three switch shanties located on the main line, but within what were known as the "yard limits" of Bloomington, which extend from a point about three-fourths of a mile south of the passenger station to a point about 7 miles north thereof. Trains are operated over this 7¾ miles, which is double tracked, under the control of the yardmaster. A switch tender was on duty at each switch shanty

and his work pertained to and affected the movement of trains both on the main line and the yard tracks proper. This work was "to throw switches, relieve yard, train, and engine crews of this work, and to avoid delays to trains moving through the yard." Each shanty was equipped with a telephone connecting it with the yardmaster's office and with the other shanties. The yardmaster directed all movements and the telephones were used to permit him "to keep in closer touch with such movements and to *issue instructions or orders to yard, train, or engine crews as to the handling of cars or trains*, or as to any other work that he may desire performed." He also used them "to instruct said employees what tracks to line up for trains coming into or moving through the yard, said trains at all times moving under yard-limit rules." The yard rule shown by the record is:

> All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear.

The actual duties performed by the switch tenders are clearly shown by what occurred on the day mentioned in the declaration. One of the main line tracks through the yards was commonly used for northbound trains and the other for southbound trains. But, on that day, on account of yard congestion, a freight train was left standing on the northbound track. It therefore became necessary to pass three northbound trains over the southbound track. To accomplish this, the yardmaster called up the

switch tenders at all three shanties and gave them the following *order:*

> Trains Nos. 6, 10, and 8 will run over the southbound main track from Locust Avenue to Seminary Avenue.

And this order they transmitted, as they always transmitted such orders, to the engine or train crews either verbally or by hand signal, and the movement of the train was controlled accordingly.

The order above mentioned was given to one switch tender, so that he could communicate it to the engineers in order that they might have their trains under control when passing through the crossover switch. It was given to another in order that he might have his switches properly lined up and hold other trains off the track, and to the third in order that he might stop incoming trains far enough back to permit Nos. 6, 10, and 8 to cross safely and to guard against other engines running over the tracks needed for those trains. This, of course, made it necessary to transmit the order to the crews of such engines or trains as it was necessary to stop or keep off the track. (R., pp. 15–18.)

The question is, Do these facts bring the switch tenders in question within the terms of the proviso?

BRIEF OF ARGUMENT.

I.

The question involved is whether these switch tenders are within the terms of the proviso which we have quoted. (34 Stat., ch. 2939, pp. 1415, 1416.)

II.

The contention of the Government is that all employees, in whatever department, who, as a part of their regular duties at a fixed place, transmit or receive train orders by wire are included.

III.

The opposing contention is that only such employees as are in what is commonly known as the dispatching department are included.

IV.

The switch tenders are stationed at switch shanties in a yard 7¾ miles long. They receive, by telephone, and transmit to engine or train crews, the orders by which the movement, within the yards, of all trains are controlled, including main line trains passing through the yard. (R., pp. 15–18.)

V.

The language of the statute, "other employee who by the use of the telegraph or telephone dispatches reports, transmits, receives, or delivers orders," etc., standing alone, would undoubtedly include these men.

VI.

The coupling of this language with the term, "operator or train dispatcher," does not, under Lord Tenterden's rule, exclude them, because—

First. They are like employees with operators and dispatchers in the one particular which the proviso makes the test.

Second. If the words "operator or train dispatcher" would indicate a purpose to confine the proviso to the dispatching department or to those primarily engaged in transmitting or receiving train orders by wire, they exhaust the class.

Third. The fact that all the employees of the dispatching department are not included is conclusive that it was not intended to confine the proviso to any particular department but that it was intended to make the nature of the service the test.

United States v. *Mescall*, 215 U. S. 26, 31.
National Bank v. *Ripley*, 161 Mo. 132.
Chicago, Rock Island, &c. Co. v. *United States*, 226 Fed. 27, 30.

Contra:

Missouri Pacific Ry. Co. v. *United States*, 211 Fed. 893.

ARGUMENT.

From the agreed facts it appears that trains, when outside of yard limits, are under the control of the dispatcher and the operators. The latter receive, by wire, orders governing train movements and deliver them to the trainmen. But when one of these trains enters the limits of the yard it passes from the control of the dispatcher to that of the yardmaster. He gives his orders, by telephone, to the men in the switch shanties, who communicate them, by mouth or signal, to the trainmen. The orders so given are for the purpose of securing the safe passage of trains through the yards and avoid-

ing collisions with engines or trains operating wholly within the yard. Within the yards the yardmaster performs a function which is like that performed by the dispatcher with respect to the open road. The switch tenders sustain to him a relation like that sustained by the operators to the dispatchers. They receive, by telephone, and transmit to trainmen orders by which the movement of trains is governed.

That the words of the statute, "employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements," standing alone, would include these switch tenders can not be denied. The argument, however, is that, looking to the context and having regard to recognized rules of construction, their meaning should be sufficiently narrowed to exclude these men.

QUESTION INVOLVED.

We are agreed that, in the language of opposing counsel, "the broad class of employees to be affected consisted of persons actually engaged in or connected with the movement of any train," and that no one in that class is to remain on duty continuously longer than 16 hours. We are also agreed that there has been carved out of this class, by the proviso, a smaller class as to which a shorter period of continuous service is prescribed.

We are not agreed as to what employees are included in the smaller class. We agree that Congress

deemed 16 hours' service too long for persons discharging certain duties. We disagree as to how it drew the line of distinction. The railroad says that the line was drawn between *recognized departments* of the service. We say it was drawn with regard to the duties performed.

Hence the contention, on one side, is that the proviso includes only those employed in what is commonly known as the dispatching department, and, on the other, that it includes every employee, in any department, whose duties require him to transmit or receive, by telegraph or telephone, orders affecting the movement of trains. This is the whole controversy.

CONTENTION OF THE GOVERNMENT.

Our contention has the advantage that it takes the words used by Congress, without addition, omission, or transposition, and, without invoking the aid of any technical rule, gives them their ordinary meaning. So read, the proviso includes every employee who transmits or receives train orders by telegraph or telephone. This was accomplished by first naming operators and train dispatchers. These were well understood terms. No qualifying words were necessary and none were used. The duties of persons so designated are matters of common knowledge. They are clearly stated in the brief for the railroad company thus:

> The operator gathers the information as to road conditions, transmits it to the dispatcher's office and in turn receives from that office

> orders to be handed to the train men to govern their movements on the road.

To this may be added that communication between dispatcher and operator is by wire. But there were others than operators and dispatchers discharging very similar duties, notably the yardmasters and their switch tenders. It was the purpose to include these, but it would be difficult to name them by the use of terms that would be recognized as embracing all. It was necessary, therefore, to describe them by reference to the service performed. Accordingly, after naming operators and dispatchers, the proviso proceeded to name any—

> other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements.

The effort, obviously, was to include all who performed a service similar, in one particular, to that of operators and dispatchers—the transmitting or receiving orders affecting the movement of trains.

These switch tenders, within the yard limits, performed precisely the service described, and that service was the same service performed by operators with respect to trains outside of the yard limits.

CONTENTION OF THE RAILROAD.

The contention of the railroad company has the disadvantage of requiring the addition of words and then a forced and unnatural construction of the added words.

As construed by counsel, in their brief, the proviso is made to read as follows, the words italicized being added:

> Provided, That no *telegraph* operator, train dispatcher, or other *like* employee who by the use of the telegraph or telephone, etc.

And then, to support the argument, "like employee" is construed to mean one in the dispatching department because operators and dispatchers happen to be in that department. The only limitation Congress has seen fit to apply to the *other employees* whom the proviso includes is that they shall be charged with the duty of transmitting or receiving orders by wire. It is now insisted that the class so described shall, by construction, be further limited so as to include only those of the employees discharging those duties who happen to have been placed by the railroad in one of the arbitrary departments into which it has divided its business. And hence the contention is that those employees who transmit or receive orders for controlling the movements of trains while within yard limits are excluded.

To express, in plain language, the meaning thus given it, the proviso must undergo a further remodeling than that shown by the above quotation from the brief for the railroad. It would read as follows, the added words being italicized:

> That no *telegraph* operator, train dispatcher, or other *like* employee *in the dispatching department* who by the use of the telegraph or telephone dispatches, reports, transmits,

receives, or delivers orders pertaining to or affecting train movements *outside of yard limits*, etc.

And thus the proviso as enacted by Congress would be scarcely recognizable.

INTENT OF THE PROVISO.

Before a particular intent can be imputed to Congress, some words must be found in the statute which fairly interpreted express that intent.

Here we are agreed that the general intent was to guard against the dangers inhering in train movements when controlled by men physically and mentally fatigued through too long continuous service. We must also, we think, be agreed that the difference between the strain on one responsible for such movements on the open road and one responsible for them within yard limits is at most only one of degree. Owing to the slower movement of trains in yards, the danger of serious accidents may be somewhat less. But the danger is existent. Mistakes in orders will cause accidents, and such accidents do occur. Obviously, Congress did not consider the difference in *degree* of danger sufficient to warrant a distinction in fixing hours of service. It used the term "train movements" without qualification. To confine this to movements outside of yard limits is to impute an intent not expressed. Manifestly, it includes *all* train movements.

NO DISTINCTION BETWEEN EMPLOYEES ON ACCOUNT OF THE DEPARTMENT IN WHICH THEY WORK.

Since all train movements are included, it is impossible that there should have been any intent to confine the proviso to employees in what is commonly known as the dispatching department. Counsel for the railroad very correctly say that "when yard limits are entered the train is outside the purview of the dispatcher," and that, within yard limits, in this case 7¾ miles, "there is no train dispatching." But there are orders transmitted and received by telephone by which train movements are controlled and there are men, not in the dispatching department, on duty in towers, shanties, and other places who receive and deliver such orders. If, therefore, the proviso was to relate to *all* train movements, it necessarily must include these men. Hence, when it was made to apply to all train movements, without qualification, there was expressed an intent that it should not be limited, as now insisted, to men in the dispatching department.

Moreover, if the present contention be sound, the words "other employee" are wholly useless and serve no purpose. Every man in the dispatching department who transmits or receives orders by wire is either an operator or dispatcher. He may be at the same time a station agent or hold some other position, but he is also an operator.

RULE OF EJUSDEM GENERIS.

The entire argument for reversal rests upon an attempted application of what is sometimes known as Lord Tenterden's rule, which has been stated by this court to be—

> that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*. (*United States* v. *Mescall*, 215 U. S. 26, 31.)

But, as was said in the case just cited, quoting from *National Bank* v. *Ripley* (161 Mo. 132)—

> this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. (Id. p. 31.)

It can not avail here for several reasons.

First. Under the strictest possible application of the rule in question, the judgment is correct. No one will claim that, in order to be embraced in the general terms, a person or object must be *identical* with some person or object described by the particular words. All that can be claimed is that there must be enough similarlity to justify including both in some general classification. This similarity, in a statute of this kind, may relate to the place at which service is rendered or the character of the

service. It may exist with respect to all the duties or only a part of the duties of two employees. And the general terms may be followed by language indicating the point of similarity. Here the required similarity is in plain language made to consist of transmitting and receiving, by wire, train orders. Congress might have added the further point of similarity, now insisted on, that the "other employee" mentioned should be in the same department of service with operators and dispatchers. But it did not do so. It was content to include all such employees as were like operators or dispatchers, in the one particular that they transmitted or received train orders by wire. Confessedly, the purpose was to broaden the scope given the Act by the use of the particular words "operator or train dispatcher." Merely numbering the classes enumerated, without changing punctuation or a single word, the proviso reads:

> That no (1) operator, (2) train dispatcher, (3) or other employee who by the use of the telegraph or telephone, etc.

The first two classes, as insisted by opposing counsel, are too well known to require definition. The third describes the class, outside of operators and dispatchers, to be included. Taking this view, the Circuit Court of Appeals rejected the theory that the proviso applied only to those employees primarily engaged in a particular service and followed its own decision in *Chicago, Rock Island & Pacific*

Ry. Co. v. *United States* (226 Fed. 27, 30), in which its conclusion had been well stated thus:

> Congress may well have deemed it unsafe to permit employés whose duty it is, not primarily or principally, but ordinarily and habitually, to transmit such important orders, and in doing so to exercise whatever measure of skill, care, alertness, and attention the use of either telegraph or telephone requires, to work 16 hours, however simple or non-fatiguing their ordinary tasks may be.
>
> Furthermore, the class that includes only those whose principal duty is to transmit such orders by telegraph or telephone does not include all who concededly are within the proviso; an operator or train dispatcher may also be a station agent, and his primary and principal duties may be in the latter capacity. If, unlike *United States* v. *Mescall* (215 U. S. 26; 30 Sup. Ct. 19; 54 L. Ed. 77), the particular words, "operators and train dispatchers," do not exhaust the class and thus make the rule of ejusdem generis inapplicable, the only all embracing designation covering those concededly within the proviso, is an employé who ordinarily and habitually uses the telegraph or telephone for the purposes stated. Defendant's employés here in question come within this class.

Second. *United States* v. *Mescall*, *supra*, lays down the rule that—

> where the particular words exhaust the class, the general words must be construed as embracing something outside of that class.

It is said that the class indicated by the particular words used is those employed *in the dispatching department* to transmit or receive train orders by wire. The same idea was expressed by the Circuit Court of Appeals for the Eighth Circuit when it held, in a case cited against us—

> that Congress intended by the use of the words "other employé" to mean an employé engaged primarily in the same class of service as would be performed by an operator or train dispatcher. (*Missouri Pacific Ry. Co.* v. *United States*, 211 Fed. 893, 897.)

Aside from the objection to this construction, that it writes words into the statute which Congress did not use, it deprives the words "or other employee" of any force or effect whatever. As we have seen, there are employees, such as those involved in this case, who, as a part of their regular duties, transmit or receive train orders by wire. But the only employees in all railroad service who are *primarily* engaged in that work are operators and dispatchers. Certainly there are no others so *primarily* engaged in the dispatching department. The very fact that one employed in that department is so engaged makes him either an operator or dispatcher. Hence, the words "operator or train dispatcher" exhaust the class either of those in the dispatching department who transmit or receive train orders by wire or of those in any department who are *primarily* engaged in that work. To confine the proviso, therefore, to either of these classes is to say that the

words "other employee" add nothing to the meaning of the words "operator or train dispatcher" already used. Under the rule invoked, then, these words must be held to have added another class—those who, though not in the dispatching department and not *primarily* so engaged, do, as a part of their regular duties and at a fixed place, such as a tower, switch shanty, or station, transmit or receive train orders by wire.

United States v. *Mescall*, *supra*, leaves no escape from this construction. There, the statute was:

> That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise * * * or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties * * * such person shall, upon conviction, * * * . (215 U. S. 26, 27.)

The indictment charged false weighing by an assistant weigher for the Government. Lord Tenterden's rule was invoked, and it was insisted:

> The particular words of description, it is urged, are "owner, importer, consignee, agent." The general term is "other person," and should be read as referring to some one similar to those named, whereas the defendant was not owner, importer, consignee, or agent or of like class with either. He was not making or attempting to make an entry. He represented the Government, and, contrary to his duties, was rendering assistance to the consignee who was making the entry. (Id., p. 31.)

But the court quoted with approval from the Missouri case above referred to:

> If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose. (Id., pp. 31–32.)

It was accordingly held:

> Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term "other person" was a meaningless addition. (Id., p. 32.)

The application to the present case is too obvious to require amplification.

Third. Recognising the necessity of a construction which will give some meaning to the words "other employee," opposing counsel have labored hard to find some reason, consistent with the theory that the proviso is confined to the dispatching department, for their use. It is said that there are many employees, such as messengers, in the dispatching department to whom the proviso does not apply. But does not this very fact take from the departmental theory its last semblance of plausibility? It means that Congress saw no reason for

applying the nine-hour rule to the dispatching department as a whole. Looking over that department it found that the only employees who transmitted or received train orders by wire were operators and dispatchers, and these it named. Others in that department were not named because not so engaged. Obviously, the selection was because of the nature of the service rendered and not because of the particular department to which the company assigned the men. But making its selection according to service rendered, Congress found men, such as these switch tenders, in other departments performing that same service. And hence it added words which would include all employees performing such service.

It is also suggested that Congress may have thought that an employee in the dispatching department using the telephone instead of the telegraph might not be classed as an operator, and hence required to work 16 hours. But the proviso contains no reference to any department. The language applies equally to a station agent or other employee in the dispatching department and to a switch tender where both use the telephone for the same purpose.

It is respectfully submitted that the judgment should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

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